Before the
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In the matter of:	
	Docket No.
Distribution of the	2001-8 CARP CD 98-99
1998 and 1999 Cable	
Royalty Funds	

Room LM-414
Library of Congress
First and Independence Ave. S.E.
Washington, D.C. 20540

Thursday,
May 15, 2003

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE CURTIS E. Von KANN   Chairman
THE HONORABLE JEFFREY S. GULIN   Arbitrator
THE HONORABLE MICHAEL D. YOUNG   Arbitrator

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I-N-D-E-X

E-X-H-I-B-I-T-S

1   P-R-O-C-E-E-D-I-N-G-S

2   (9:36 a.m.)

3   JUDGE VON KANN: All right, good morning,

4   everyone.

5   Any procedural or administrative matters

6   before we get rolling?

7   MR. TUCCI: One, Your Honor.   You may

8   recall yesterday we did a calculation on the board

9   with Mr. Fuller and Mr. Garrett erased it before we

10   could use it as a demo. exhibit, so we have recreated

11   the calculations and would ask that we be allowed to

12   pass out PS Demo. No. 10 which is the calculations.

13   JUDGE VON KANN: Thank you.

14   (Whereupon, the above-referred

15   to document was marked as PS

16   Demonstrative Exhibit 10 for

17   identification.)

18   While we're on the subject of exhibits, I

19   put in my notes, according to my notes we are still --

20   we still haven't quite resolved JSC 100 and I see Mr.

21   Cooper is back today and I wonder if -- are getting

22   close to some resolution on that?

1   MR. COOPER: Yes, I think we resolved it.

2   We're doing some work and I think we'll have something

3   shortly.

4   JUDGE VON KANN: All right.

5   MR. COOPER: I don't think there's really

6   a dispute, but just a question of us --

7   JUDGE VON KANN: Okay, let's just not

8   forget to clean it up when we get a chance.

9   Okay, we're working on the temperature

10 issue and perhaps making some progress.

11   Okay, Mr. Dove, it looks like you, today.

12 Is that right?

13   (Pause.)

14   MR. TUCCI: Let's recall the Demo.

15 Exhibit. It has two typographical errors that were

16 just pointed out.

17   JUDGE VON KANN: Okay.

18   MR. TUCCI: That's not a good start today.

19 I hope the rest goes better.

20   JUDGE VON KANN: Do you want to take back

21 a percentage or two or just the exhibit?

22   (Laughter.)

1   Okay, some days it's like that. It

2   happens.

3   Mr. Dove.

4   WHEREUPON,

5   LELAND JOHNSON

6   WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE PUBLIC

7   TELEVISION CLAIMANTS AND, HAVING FIRST BEEN DULY

8   SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

9   DIRECT EXAMINATION

10   BY MR. DOVE:

11   Q   Good morning, Dr. Johnson.

12   A   Good morning.

13   Q   Would you please state your full name for

14   the record?

15   A   Leland L. Johnson.

16   Q   And what is your educational background?

17   A   I received my Ph.D. in Economics in 1957

18   from Yale University and before that a bachelor's

19   degree and a master's degree from the University of

20   Oregon.

21   Q   Was that also in economics?

22   A   Business Administration.

1   Q   Business Administration.

2   A   Yes.

3   Q   After you graduated from Yale with your

4   Ph.D., what did you do?

5   A   My career is really divided into several

6   segments. I started at the Rand Corporation. Moved

7   to Santa Monica, California and soon after the

8   Russians launched Sputnik that focused a lot of

9   attention on the potential of communications being

10   served through satellites. So there was thought

11   perhaps of orbiting balloons that we could bounce

12   signals. A lot of interest in alternative

13   technologies and I became heavily involved, as an

14   economist, looking at the economics of the technology.

15   What kinds of benefits might we get from this new

16   technology, world-wide television, much more lower

17   cost telephone service. So I examined those

18   alternatives in the early years after I went to the

19   Rand Corporation.

20   Q   After you conducted those early projects

21   at Rand, what was the next thing you did?

22   A   I was offered the opportunity to serve as

1 the director of research for the President's Task

2 Force on Communications Policy in Washington. That

3 was a one-year assignment. And there, I directed the

4 research dealing with the whole range of

5 communications issues, satellites being one, of

6 course, but television broadcasting, use of radio

7 spectrum, the infant cable television industry and we

8 finished our report, as I recall, in December of 1968.

9 And that was the next phase, so to speak, of my

10 career.

11   Q   After you finished your time as director

12 of research on the President's Task Force, what was

13 the next thing that you did?

14   A   Back to Rand. Santa Monica. There I had

15 challenging opportunities to address directly issues

16 in the cable television field. Cable television was

17 really attracting a lot of attention at that time.

18 Wired into the home with a wide range of services,

19 heretofore unavailable, and two main issues were

20 copyright, should distant signals be subject to

21 copyright?

22   The second was focus on the impact of

distant signal importation on local broadcasting. As you'll recall, there was much concern about the growth of cable, perhaps threatening the existence of free television and I looked at the impact then that we could expect from the growth of cable television and how those signals should be treated in terms of copyright.

Q   When you say you were involved in these areas, you looked at these areas, what were your specific responsibilities in connection with issues of copyright compensation and distant signal importation?

A   I looked at the -- with respect to copyright. There were many who argued there should be no copyright if you put up a large antenna 100 miles away and you pick up a signal, then it should bear no special responsibility.

Q   Then we wouldn't have these great proceedings?

A   That's right, that's right. And I came out opposed to that view. I came out with basically full copyright.

JUDGE YOUNG: Because he wants these

1   proceedings.

2   (Laughter.)

3   THE WITNESS: Right, right. And then we

4   went to the compulsory license system because of the

5   difficulty of implementing in the real world a full

6   copyright system.

7   BY MR. DOVE:

8   Q   After that particular phase in your career

9   what was the next position that you held?

10   A   I went back to Washington. This time as

11   associate   administrator   with   the   National

12   Telecommunications Information Administration, NTIA,

13   and there again, we dealt with the whole range of

14   issues in the communications field, certainly cable

15   television.

16   At that time, as I recall, cable networks

17   were just coming into prominence. Satellites were

18   being used for the first time to tie together cable

19   head ends and we did a good deal of work resulting in

20   filings before the Federal Communications Commission

21   and many other activities.

22   Q   What   were   your   responsibilities   as

1   associate administrator?

2   A   I directed the research, a staff in

3   Washington and also in Boulder, Colorado. I assisted

4   in coordinating the research activities and reviewing

5   draft documents and assisting the Administrator in

6   filing documents, final form, before various

7   government bodies.

8   Q   After you finished your position as

9   Associate Administrator in 1978 to 1979, what did you

10   do next?

11   A   I went back to the Rand Corporation and

12   again continued with my interest in the cable field.

13   I was especially concerned about the potential merger

14   of telephone and cable services, the one wire into the

15   home.   There was much a video dial tone, you'll

16   recall, was a popular phrase. There was much concern

17   by the Federal Communications Commission in this area

18   in terms of regulation.   So I wrote a number of

19   studies in that area, video dial tone, and then the

20   issue of direct satellite competition with cable

21   systems, as you'll recall, there was much concern

22   about the extent to which cable systems operate as

1   monopolies and interest in looking at new technologies

2   and the regulatory implications of developments that

3   would reduce those monopoly pressures. And a measured

4   candidate for direct investigation was the direct

5   broadcast satellite. I say that because at the time

6   I started the studies, these satellites were nothing

7   more than drawings and proposals and looked in the

8   early stages at the potential of that technology for

9   development into the years that we're now living.

10   As a matter of fact, I did conclude that

11 direct broadcast satellites would eventually become

12 quite a significant competitor.

13   Q   After finishing these particular projects

14 at Rand, what did you do next?

15   A   I retired from Rand in 1993, giving me an

16 opportunity to do other things far beyond what I had

17 done before. I was attracted by the opportunities in

18 the private consulting field and for some years after

19 that then I was heavily involved with clients listed

20 in my resume and with filings listed, dealing, again

21 with the issue the potential merger of telephone and

22 broadband services and the implications for federal

1   regulatory policy and I did that on behalf of private

2   clients.

3   Q   I notice on -- turning to your curriculum

4   vitae which is attached as Exhibit 26 in Public

5   Television's Volume 2.

6   A   Let me grab Volume 2 and take a second.

7   (Pause.)

8   Q   Turning to page 2 of your curriculum

9   vitae, Dr. Johnson, I noticed under professional

10   memberships and honors that you were Chairman of the

11   Board of Directors of the Telecommunications Policy

12   Research Conference in Washington in 1992.

13   A   Yes.

14   Q   What is the Telecommunications Policy

15   Research Conference?

16   A   That's a conference that meets once a

17   year. At that time, in 1989, for example, just below

18   it, it met at Airley House, but it meets in various

19   locations in the Washington area. It based together

20   economics, engineers, social scientists to focus on

21   the wide range of issues in the communications field

22   and certainly cable television.

1   I served in various capacities. This is

2   an example of the many professional activities that I

3   was involved in and in 1992 I served as Chair of the

4   Board of Directors, organizing and operating the

5   conference for that particular year.

6   Q   I also noticed in your curriculum vitae

7   that you've published a number of -- well, you

8   published a book and a number of articles and other

9   publications   relating   to   telecommunications

10   specifically some to cable television.

11   A   Right.

12   Q   What types of issues have you addressed in

13   these publications? Let me turn first, I suppose to

14   your book which was <u>Toward Competition in Cable</u>

15   <u>Television</u> published in 1994?

16   A   Yes.

17   Q   What was that about?

18   A   MIT Press. It dealt with the issue of

19   competitive pressures on cable systems as I discussed

20   earlier, especially the role of satellites, the role

21   of telephone companies that might provide broadband

22   services in combination with telephony, in competition

1 with existing stand alone cable systems, that that

2 brought together a lot of the research that I had done

3 at Rand, plus some additional research in cooperation

4 with the American Enterprise Institute.

5 Q   In paging through this, I note

6 particularly on page 6, bottom of page 6, top of page

7 7 some articles involving the importation of distant

8 signals and the future of cable television.

9 A   Yes.

10 Q   Can you just explain briefly what these

11 articles were about?

12 A   Yes, of course. On page 6, the final

13 entry is a very good example of my concern about local

14 broadcasting. Cable television and questions of

15 protecting local broadcasting, especially UHF

16 stations, struggling UHF stations, could those

17 stations withstand the competition of distant signals

18 coming in where distant signal importation was of

19 critical importance to the growth of cable systems.

20 In San Diego, for example, the operator

21 was heavily dependent on the import of Los Angeles

22 signals. Question, should the Federal Communications

1   Commission permit those signals to be imported or

2   under what conditions?

3   As I recall, the Vancouver, B.C. cable

4   system was the largest in the world because in large

5   part, it was able to bring in the Seattle signals. In

6   those days, we did not have cable networks and so

7   distant signals were of vital importance to the future

8   of the industry.

9   Q   I notice also on that same page 6, just

10   another example of your article on this topic,

11   "Spanning the Use of Commercial and Non-Commercial

12   Broadcast Programming on Cable Television Systems,

13   1975." What is that about?

14   A   Very much a concern here about the growth

15   of public broadcasting and how public broadcasting

16   would benefit from the expansion of cable television

17   systems that would bring improved signals into areas

18   of the country that would otherwise be under served or

19   unserved entirely.

20   Q   Finally, if I could just focus your

21   attention on your testimony, I guess it's on page 9,

22   top of page 10, particularly, I understand you've

testified before Congress and administrative agencies.

A   Yes.

Q   On issues relating to cable television?

A   Yes, yes.   The bottom of page 9, the testimony before the U.S. House of Representatives, dealing specifically with issues of distant signal importation, how should the new industry be regulated. The top of page 10, the issue of copyright, especially.   That was a presentation before the FCC.

Q   Dr. Johnson, are you sponsoring testimony in this proceeding?

A   Yes.

MR. DOVE: At this point, I'd like to make Dr. Johnson available for voir dire.

JUDGE VON KANN: Anybody? No?

MR. GARRETT: Can I ask him about Sputnik?

(Laughter.)

JUDGE VON KANN: If you wish. Let me ask one question.

Dr. Johnson, I see just skimming the CV, that you've co-authored several articles with Stanley Bessen.

1   THE WITNESS: Oh yes.

2   JUDGE VON KANN: Is that the same Dr.

3   Bessen who has previously testified in some of these

4   CARP cases?

5   THE WITNESS: Yes, indeed. We worked for

6   a number of years together.

7   JUDGE VON KANN: Okay, thank you.

8   BY MR. DOVE:

9   Q   Dr. Johnson, I'd like for you now to turn

10   to the tab of Public Television's Volume 1, labeled

11   Leland Johnson.

12   A   Yes.

13   Q   I would ask do you recognize the document

14   behind this tab entitled "Testimony of Leland L.

15   Johnson"?

16   A   Yes.

17   Q   Is this your written direct testimony in

18   this case?

19   A   Yes.

20   Q   Do you have any corrections to make?

21   A   Yes.

22   Q   Let me just stop here. Dr. Johnson has a

1   few minor numeric corrections and we've prepared a

2   corrections page. Let me pass that out and then you

3   can explain it.

4   (Pause.)

5   This is page 21.

6   (Pause.)

7   Dr. Johnson, would you please explain the

8   corrections you wish to make?

9   A   Yes, on page 21, six lines from the top at

10 the end, the 95 percent figure should be corrected to

11 92.

12   In the next line, in 29.6 figure should be

13 corrected to 29.1.

14   And the following line, the 42 percent

15 figure is revised to 37.

16   And in the next line, the 39 percent

17 figure is revised to 38 percent.

18   Q   And Dr. Johnson, are these corrections

19 that you just stated reflected in the revised

20 correction page that I just handed out which has the

21 header at the top "Testimony of Leland L. Johnson,

22 Corrected May 15, 2003"?

1   A   Yes.

2   Q   Do these corrections change or affect your

3   conclusions in this report in any way?

4   A   No, no material way.

5   Q   With these corrections, do you believe

6   this testimony to be true and correct to the best of

7   your knowledge?

8   A   Yes, I do.

9   Q   Dr. Johnson, what do you understand the

10   purpose of your testimony to be?

11   A   The purpose is to assist the CARP in

12   setting awards for the --

13   JUDGE VON KANN: Can I just clear up one

14   thing before we get into substance.

15   On a very clerical matter, I think that

16   you probably need to file that corrected page with the

17   Copyright Office, so their record is complete. I

18   don't -- we don't have any problem with receiving the

19   correction here. I'm not even sure it requires a

20   formal motion, but I think you need to do that.

21   MR. DOVE: That would be fine. I know

22   this has happened in the past, but if the past

1   practice would be to file it with the Office, we'll do

2   that.

3   JUDGE VON KANN: I would be willing to

4   entertain an oral motion to that effect and I assume

5   there's no opposition from anyone?   Granted.   Now do

6   it.

7   (Laughter.)

8   BY MR. DOVE:

9   Q   Dr. Johnson, I'll re-ask the question.

10   What do you understand the purpose of your testimony

11   in this proceeding to be?

12   A   To assist the CARP in setting award levels

13   for the years 1998 and 1999 that reflect the many

14   changes in this industry structure and elsewhere that

15   need to be taken into account in moving from the

16   earlier Public Television award of 5.5 percent that

17   was in place for the 1990-1992 period.

18   Q   After you conducted your analysis and

19   we're going to talk in detail about your methodology

20   and your analysis, what were your final conclusions?

21   A   My final conclusions were that taking into

22   account, especially the effects of the WTBS withdrawal

from the compulsory license pool at the end of 1997,

an increase in the PTV award to 10.3 percent for 1998

and to 10.7 percent for 1999 would be appropriate.

Q   And in reaching this conclusion, Dr.

Johnson, what sorts of information did you look at?

A   I wanted to focus on behavioral

indicators, changes in the levels and composition of

signal carriage, changes in revenues, shifts within

the industry from the compulsory license pool to the

cable network market, growth in subscribership, many

important changes that we would expect over a time

period of 5, 6, 7 years which is the period of concern

here.

Q   What was the first thing that you did in

analyzing this particular problem?

A   I started with the simplest possible model

and I asked what is sort of the direct implication of

the WTBS departure where that super station was

responsible for roughly half of the independent

station distant signals and roughly one third of total

distant signals being carried.

So what I did -- let's take here $100 and

1   a PBS share of 5.5 percent. And that comes to $5.50.

2   Now let's suppose there is a departure from the pool

3   and it goes say to $80 and we have existing 5.5

4   percent. That translate -- and if we just take that

5   of the new pool that comes to $4.40.

6   Now this change has nothing to do directly

7   with PBS. PBS programming is now carried on the

8   signal that has shifted from the pool. These numbers

9   are hypothetical. I'm just taking an 80 just to

10   illustrate.

11   So of that smaller pool you would expect

12   that an adjustment would be appropriate in order to

13   bring the PBS award back up to $5.50.

14   What is the award level that would do

15   that? It ends up being 6.875. That's just straight

16   mathematics to keep the dollar amount of the award

17   constant.

18   If the pool falls in size, then the

19   percentage award would have to rise, proportionately

20   in order that the award then be restored to $5.50.

21   So that was the --

22   Q   That was the simple model that you used?

1   A   Yes.

2   Q   Initially, just to try to get a -- grips

3   the general nature of the problem?

4   A   Yes.

5   Q   To   start   us   out   here,   for   Public

6   Television to get the same dollar award that they had

7   in 1998 and 1999 that they had in 1997 using this very

8   simple model, what did you conclude?

9   A   Well, looking at the revenue streams and

10   how those streams change with the withdrawal of WTBS,

11   I concluded that the 5.5 percent award for 1992 should

12   be raised to 7 percent for 1998 and to 6.7 percent for

13   1999, thereby leaving Public Television in about the

14   same dollar position as without the WTBS departure.

15   Q   And that sounds simple enough. Why don't

16   we just -- why didn't you just stop there and go home?

17   Why do we have the rest of your report?

18   A   Well, for two reasons. We could all just

19   go home.

20   (Laughter.)

21   Two reasons. Well, obviously, there were

22   many other factors that need to be considered.   The

1   WWOR departure in 1997 for one and all of the things

2   that one can imagine, subscriber levels changing, many

3   other movements within the distant signal market, a

4   substitution between cable networks and distant

5   signals across the board and during the whole time

6   period.

7   And second, we must have a better

8   methodology here. When I look at the revenue pools,

9   at the bottom of page 6 and page 7, these numbers are

10   heavily influenced by arbitrary allocations of fees.

11   I'll get into this later and it is very useful to move

12   beyond to look at other behavioral indicators and the

13   thrust of this is in doing that.

14   Q   Now, you've mentioned of factors, various

15   other factors that would need to be considered or that

16   would have been part of the change that occurred over

17   the time period, the expansion of the cable subscriber

18   base in revenues, the substitution between cable

19   networks and distant signals, changes within

20   composition of distant signals carried. I believe

21   these are on Page 4. These are all operating in

22   addition to the WTBS withdrawal; is that correct?

1   A   Yes. The WTBS withdrawal was an important

2   factor, certainly, but not the only factor that one

3   would need to take into account.

4   Q   Now, before we jump into kind of the next

5   part of your methodology, what were the -- did you

6   have any kind of overarching principles, anything --

7   as you start to get your mind around this problem kind

8   of some overarching principles in addressing this

9   problem that were in the back of your mind?

10   A   Yes.

11   Q   And what were those principles?

12   A   Yes. Two principles. First, the basis

13   for setting awards should rest on the notion of

14   relative program valuation, the willingness to pay by

15   cable operators. How much is the operator willing to

16   pay for this category as opposed to how much the

17   operator is willing to pay for another category? If

18   the one category shows $100 while the cable operator

19   would pay $50 for a second category, then the relative

20   valuation would be two to one. So that is the first

21   principle. Yes?

22   Q   Well, I was just going to say is part of

1   this -- I mean is it true that the awards structure

2   that we're trying to -- attempting to replicate here

3   is it something that you're trying to simulate the

4   free market?

5   A   Yes. Yes. Relative willingness to pay,

6   and I predicate that on the second principle, and that

7   is that the objective is to move toward outcomes that

8   would be reflective of the free market, not that we

9   can exactly duplicate the results of that market, but

10   we always have in mind in moving ahead the question of

11   what would the free market do in this situation that

12   we're facing? How might the outcomes in the free

13   market compare with those that are being proposed

14   here? And, again, in pursuing that goal of

15   replicating the outcomes of the free market,

16   willingness to pay, relative program valuation is the

17   method for doing that.

18   Q   Now, you mentioned a number of times the

19   word, "relative," and I think that is an important

20   word here. I mean why is it important to focus on

21   relative valuation, particularly in the context of the

22   WTBS withdrawal and the circumstances at issue in this

1 case?

2 A   Because it is the relative magnitude that

3 we're concerned with here. If we're talking about an

4 award of say 5.5 percent, that is a percentage

5 relative to 100. If we say that a particular category

6 should receive an award of 30 -- a share of 30

7 percent, the implication is that the value of that

8 programming is perhaps 30 percent of the total. If

9 the operator is willing to pay $100 again for this

10 category and $300 for another category, then the award

11 structure would presumably reflect the difference.

12 Q   Again, the focus is on relative value, not

13 absolute value.

14 A   The focus is on relative value throughout,

15 yes, because the awards themselves are measures are

16 relative magnitudes.

17 Q   After you performed your kind of simple

18 model analysis, what was the next thing that you did?

19 A   I was immediately attracted to data

20 relating to instances of distant signal carriage for

21 two reasons. One, these data were free of the

22 distorted effects of cost allocations. These are

1   reflective of the actual carriage.

2   Q   What is an instance of carriage?

3   A   Yes.   An instance of carriage is a case of

4   one signal transmitted by one cable system from a

5   distant broadcasting station.   The signal is

6   transmitted, it is picked up and retransmitted, and

7   that is one instance.

8   Q   That's one instance of carriage.

9   A   One instance of carriage.

10   Q   Now, with that definition, and I think I

11   may have cut you off on your answer, why did you

12   decide to use instances of distant carriage? What was

13   it that you found attractive?

14   A   This was the best measure that I could

15   find of how cable operators actually vote, if you

16   will, how they actually choose among distant signals

17   and between distant signals and cable networks.   The

18   notion of choice now being very important because if

19   we are trying to in some sense replicate the outcomes

20   of the market where free choice is exercised, then let

21   us go to data sets that also reflect choices made.

22   Q   Now, is there something -- well, there are

1   many things that are special about public television,

2   that's out contention, but is there something special

3   about public television in the context of instances of

4   carriage?

5   A   Something special.

6   Q   In the sense, does it apply to everyone?

7   I mean can we apply this methodology to all the

8   claimant categories here?

9   A   No. Public television and the Canadian

10 programming as well is the only case here where we can

11 identify directly the nature of the programming and

12 the signal, the public television signal and public

13 television. This cannot be applied to other program

14 categories that are spread across various types of

15 signals, independent signal networks.

16   JUDGE GULIN: An instance of distant

17 carriage, you call it a vote, it's not a pure vote

18 when it comes to Canadians, though, because there's

19 other programming within the Canadian signal, correct?

20 Do you follow my question?

21   THE WITNESS: Well, I would suppose the

22 cable operator near the border of Canada has a choice

1   as to whether to carry the Canadian signal. There's

2   no choice here with respect to the programming content

3   of that signal, nor does the cable operator exercise

4   choice in the broader case with respect to program

5   content of a particular distant signal. But that

6   operator, whether looking at the prospects for

7   carrying a Canadian signal or a public television

8   signal, has the choice to carry it or not, to

9   substitute it for other signals, to substitute other

10   signals for it. That is the choice. Not choice with

11   respect to specific program content on the signal.

12   BY MR. DOVE:

13   Q   Dr. Johnson, if you could turn to Table 2

14   on Page 10 of your testimony. And that table is

15   entitled, "Average Instances of Distant Signal

16   Carriage." Dr. Johnson, what does this table show?

17   A   It shows for the years 1992 to 1999 the

18   following, let's take 1992 as an example. We see that

19   539 instances of carriage were recorded for public

20   television, and we see the related numbers for other

21   types of signals, totaling 7,480 for that year.

22   Q   This is for 1992?

1   A   For 1992.   And the PTV share is 7.2

2   percent.

3   Q   So that would mean 7.2 percent of the

4   instances of distant signal carriage in 1992 were

5   attributed to public television?

6   A   Yes.   And you'll see then for the other

7   years public television showed some increase, up to

8   603 instances in 1999.   You'll notice a very

9   substantial drop in independent signal carriage that

10   reflects, in good part, the withdrawal of WTBS and

11   earlier WWOR.   The other category also fell, network

12   Canadian and Mexican stations, so that the totals

13   fell.

14   Q   And what did this -- in instances of

15   distant signal carriage over time, how did that impact

16   the public television share of distant signal

17   carriage?

18   A   As you can see, it had a striking effect.

19   The PTV share rose to 14 percent by 1999, a percentage

20   increase of 94 percent, almost twice the level of

21   1992.

22   Q   If you could turn to Table 3 on Page 11,

1   this table is entitled, "Average Instances of Distant

2   Signal Carriage Within the Basic Fund."

3   A   Yes.

4   Q   Dr. Johnson, how is this table different

5   from the table that we just talked about? Why did you

6   feel we needed to have a Table 3?

7   A   Well, I wanted to recognize the fact that

8   public television draws only from the Basic Fund, it

9   does not draw from the 3.75 Fund or from SYNDEX. And,

10   therefore, I wanted to show the shares based on the

11   Basic Fund pool. Recall that if a cable network

12   brings in signal that is covered under the Basic Fund,

13   that signal is charged on the basis of distant signal

14   equivalent, and there's a sliding scale that I

15   discuss, and I can discuss that further. But if, on

16   the other hand, the cable system brings in a signal

17   subject to the 3.75 provision, it would pay 3.75

18   percent of revenue, a kind of penalty or a fine for

19   bringing in that signal, that under previous, earlier

20   FCC rules would have been prohibited. And so public

21   television is not subject to the provision, and so I

22   wanted to subtract out the instances of carriage

associated with SYNDEX and with the 3.75 Fund to get a net set of figures that we see in Table 3.

Q   In Table 3, looking at the column entitled, "PTV Share," or Public Television Share, what does that column tell you about the change in the public television share between -- change in the public television share of the instances of distant signal carriage within the Basic Fund between 1992 and 1999?

A   Well, it shows that the PTV share again has very substantially increased, again, to over 90 percent. You'll notice that the PTV share is now over 15 percent for 1999 as compared to 14 percent in Table 2. And that illustrates simply the fact that if the pool size is reduced, then the share of a constant or rising figure would increase. The PTV share rises from eight percent to 15.6 percent by the year 1999.

Q   Now, sticking with this column, PTV share, in Table 3, as I understand it then, the share increases from 1992, I think we had a share of eight percent of instances of distant signal carriage within the Basic Fund, up to 15.6 percent in 1999?

1   A   Yes.

2   Q   Now, why not just conclude that the PTV

3 share, public television share, should be 15.5 percent

4 for 1998 and 15.6 percent for 1999, and we can then go

5 home? I'm sure my client would be very happy with

6 that. That sounds pretty good.

7   A   Well, there are complications. First of

8 all, these instances of carriage reflect nothing with

9 respect to subscriber size. A large cable system

10 retransmitting one signal carries the same weight as

11 a small cable system transmitting one signal. There

12 are so-called partial distant signals, and these are

13 treated like all other distant signals. So we need to

14 move to data that reflects or gives weight to relative

15 subscriber size.

16   Q   So what was the next step then in your

17 analysis?

18   A   Well, it turns out that subscriber

19 instances of carriage are exactly the kinds of numbers

20 that accomplish the task of adjusting for subscriber

21 base. Let me define subscriber instance. Now, if a

22 system with 10,000 subscribers carries one fully

1   distant signal, that would be counted as one instance.

2   But here it would be treated as 10,000 subscriber

3   instances.

4   Q   Let me just back up to make sure I'm

5   clear.   If you take one system with 10,000

6   subscribers, if you were using the instances of

7   carriage method, just kind of the pure instances of

8   carriage, that would be one instance of carriage.

9   A   Right, but 10,000 subscriber instances.

10   Q   But 10,000 subscriber instances.

11   A   And if you had one system carrying 10,000

12   and one's carrying 30,000 and each with one instance,

13   that second system would be weighted three times as

14   heavily as the first, 30,000 versus 10,000.   So the

15   bigger system carries greater weight.

16   And, furthermore, let's get into the issue

17   of partially distant coverage.   If a system with

18   10,000 subscribers carries one fully distant signal in

19   a partially distant signal of just 6,000, some portion

20   of that total, 6,000 out of 10,000, and yet another

21   partial of 2,000, then we have a total of 18,000

22   subscribers instances, as opposed to three instances

1   of carriage recorded in the earlier data set.

2   So you see then two things. The larger

3   cable system is accorded greater weight, and partial

4   signals are accorded only a fractional weight

5   depending on subscribership; that is, if the partial

6   distant signal covers 6,000 subscribers, it gets that

7   weight of 6,000. If it covers only 1,000, then it

8   would weighted much less.

9   Q   Dr. Johnson, if you could please turn to

10   Table 4 on Page 13 of your testimony. What does --

11   this table is entitled, "Average Subscriber Instances

12   of Distant Signal Carriage Within the Basic Fund."

13   A   Right.

14   Q   Could you please tell us what this table

15   shows?

16   A   Well, first of all, it shows you a very

17   different metric. Now we're talking about millions,

18   and before we were talking about hundreds of

19   instances. Now we're talking about, for 1992, 124

20   million subscriber instances for the whole industry.

21   If we subtract out the numbers I estimate for the 3.75

22   Fund and SYNDEX --

1   Q   That's the --

2   A   The 11.8.

3   Q   -- 11.8 million subscriber instances

4 attributed to the 3.75 and SYNDEX.

5   A   And we get a Basic Fund that is comparable

6 in concept to the Basic Fund shown in the earlier

7 table in Table 3 where, again, I'm trying to identify

8 figures relevant to the Basic Fund. And we have then,

9 in light of the recorded subscriber instances in

10 millions for public television, a public television

11 share that increases and, again, by well over 90

12 percent. It increases to a share of 11.4 percent in

13 1999.

14   Q   And this data on subscriber instances for

15 public television is this provided by Cable Data

16 Corporation?

17   A   Yes. Yes. Although I had to make my own

18 calculations for the 3.75 Fund and SYNDEX using

19 procedures I could discuss later.

20   Q   But, again, based on data provided by

21 Cable Data Corporation.

22   A   Yes. Yes.

1   JUDGE von KANN: Let me just ask both of

2 you, I know it's difficult to do sometimes, but try

3 not to talk over one another. Let him finish the

4 question, and let him fully finish the answer, because

5 it makes the transcript difficult to keep clean.

6   MR. DOVE: Thank you, Your Honor.

7   JUDGE von KANN: Okay.

8   BY MR. DOVE:

9   Q   So that I understand the percentages in

10 the column labeled, "Public Television Share," or PTV

11 Share, in 1992, there's a figure listed of 5.9

12 percent. Am I correct that that is the percentage of

13 the PTV subscriber instances, the 6.654 divided by the

14 Basic Fund subscriber instances columns, the 112.3

15 million; is that correct?

16   A   Yes.

17   Q   And just to be clear, that 5.9 percent

18 share in 1992 rises to 11.4 percent of subscriber

19 instances in 1999; is that right?

20   A   Yes.

21   Q   Now, to stay one final time with the

22 "going home" theme -- you can tell that I really want

1   to go home -- but why not just stop with the 11.0

2   percent share for 1998 and the 11.4 percent share for

3   1999?   I mean doesn't that tell us what the proper

4   share for Public Television should be in this

5   proceeding?

6   A   It would if we could value all subscriber

7   instances equally.   If this subscriber instance had

8   the same value, program value, as this one over here.

9   If what I call parity exists, this is worth, this

10   instance, just as much as this, then we could.   These

11   could be all regarded as homogeneous numbers with

12   respect to program valuation, and an award of say 11

13   percent for 1998 would be appropriate.

14   The problem is that some instances may be

15   more valuable than others.   Some kinds of programming

16   may be more valuable than others.   And the most

17   challenging aspect of my task is to treat again this

18   question of relative valuation of programming within

19   the context of subscriber instances.   I'd like to give

20   you an example of what I mean by parity and departures

21   from parity and the implications of that for setting

22   an award.

1   Let's suppose, to take an extreme example,

2   a single cable system, let's say, with 10,000

3   subscribers, carrying one TV signal, one public

4   television signal once. That's 10,000 subscriber

5   instances. Let's suppose there are on the other side

6   999 other cable systems, each also with 10,000

7   subscribers and with no partial distance signals. So

8   we can talk about once instance of carriage here and

9   over here 999 cable operators retransmitting a single

10   non-commercial signal.

11   Q   Would it be helpful, Dr. Johnson --

12   A   Yes.

13   Q   -- maybe I could write -- maybe while

14   you're talking, I'll write these figures on the board.

15   So we would have one system carrying one PTV signal,

16   10,000 subscribers.

17   A   Right.

18   Q   Okay. And then 999 -- I don't want to

19   screw this up -- 999 systems --

20   A   Each carrying one commercial signal.

21   Q   -- each carrying one commercial signal.

22   And each one has 10,000; is that correct?

1   A   Right.   Right.   And so we make it

2 symmetrical, and now we can talk about instances of --

3 one instance here as opposed to 999 over there. And

4 we ask the question how much do cable operators value

5 the programming carried on the PTV or on the 999

6 commercial?

7   Now, it's easy to imagine that the 999

8 carries a wide variety of live sporting events that

9 might be highly valued on a per hour basis, lots of

10 third- and fourth-run movies that don't have much

11 value. And the question is so what is the average?

12 If we add up the total value for 999 and we divide by

13 999 to get an average value, is there any reason to

14 believe that that average value would depart markedly

15 from the value for the single PTV signal divided by

16 one. There's a denominator as well as a numerator.

17 And when I'm talking about average, I have in mind a

18 denominator that can be quite large here. And so we

19 ask then how does the average compare in the two

20 cases? Well, it seems to me that the parity could

21 well exist, that the one signal is valued, on average,

22 the same as the other 999.

1   Now, does that mean that the award to

2   Public Television should be the same? No, of course

3   not. In fact, indeed, what should the award be in

4   this case? Well, it would be, with parity, 0.1

5   percent, one/one-thousandth. If parity obtains here

6   and if we base the award on relative program

7   valuation, the appropriate award is one-tenth of a

8   percent.

9   Q   In your hypothetical.

10   A   Yes, in the hypothetical.

11   PARTICIPANT: We don't want to go home

12 now.

13   THE WITNESS: Now, again, the concept of

14 parity. This award level varies depending on the

15 share of Public Television to the total as one out of

16 a thousand, only one out of a thousand, and that would

17 be the award.

18   BY MR. DOVE:

19   Q   So as I understand it, just to -- I think

20 it's pretty clear, but just to make sure that

21 everybody understands it, you can have parity, an

22 average public television -- the value of a subscriber

1   instance of public television can be equal to the

2   average value of subscriber instances of everything

3   not on public television. You have parity, but that

4   doesn't mean that Public Television gets 50 percent of

5   the pool and non-Public Television gets 50 percent of

6   the pool.   It relates to the relative share of

7   subscriber instances, correct?

8   A   Right. And to the average of relative

9   program valuation, again, recognizing that in the 999

10   there are going to be enormous differences in

11   valuations.   Certain kinds of programming will be

12   valued much different from others.   You add it all

13   together and you divide by 999.

14   Q   I imagine if it's not clear to everyone

15   here, you'll get some additional questions from the

16   Panel or from others here, but let me move on, and

17   this topic is going to come up again, I'm sure.

18   How did you go about determining relative

19   valuation of subscriber instances in this case? What

20   did you do?

21   A   Well, I started from my hypothesis that

22   parity is a reasonable assumption, and then I asked

1   what can we observe in the real world that would cast

2   light on that issue or relative program valuation?

3   And I focused on the 1992 CARP award of 5.5 percent,

4   and I took into account that that decision was a

5   massive   filing.   The   CARP   took   many,   many

6   circumstances into account, as you'll recall, and it

7   came   up   with   the   5.5   percent.   Had   it   used   a

8   subscriber instance of carriage and had it adopted a

9   parity   standard,   that   level   would   have   been   5.9

10   percent in Table 4.

11   Q   Now, let me stop you there, excuse me. If

12   you could explain that a little more fully here. You

13   say   that   you   went   about   determining   the   relative

14   valuation of subscriber instances. As I understand

15   it, the first thing you did was you looked at the

16   award for Public Television in 1990 to 1992; is that

17   right?

18   A   Correct.

19   Q   And that award was 5.5 percent.

20   A   Right.

21   Q   Correct?

22   A   Right.

1   Q   And you did this based on the fact that

2   there is voluminous record and a determination by the

3   CARP Panel as to what the Public Television award

4   should be.

5   A   Right.   Right.   And that award seemed

6   reasonable   in   light   of   the   evidence   at   hand,

7   conservative,   in   my   view,   but   reasonable,   a   5.5

8   percent award.   And so I asked, well, what does that

9   imply for relative valuation of Public Television?

10   And, again, if one were to take a straight subscriber

11   instances approach with parity, the award would have

12   been higher, it would have been 5.9 percent, according

13   to my figures in Table 4.   If we use the simple

14   algebra shown on Page 15, that converts to a relative

15   value   for   public   television   programming   of   92.4

16   percent.

17   Q   Let me stop you there just because I think

18   -- I want to make sure that it's clear and nobody's

19   confused.   When you use the term "relative valuation"

20   here, I mean obviously there's the relative valuation

21   that this Panel's going to have to -- the process this

22   Panel   will   go   through   in   determining   the   relative

1   valuation of the claimant categories in this

2   proceeding and the relative shares that each claimant

3   will group, but that's not what we're talking about

4   right now when you refer to relative valuation,

5   correct?

6   A   Right.

7   Q   You're talking about something different.

8   What do you mean -- when you're talking about

9   determining the relative valuation of subscriber

10   instances, what does that mean?

11   A   It means that if you use a 100 percent

12   figure, the relative valuation of this instance of

13   carriage is the same as this, the relative values are

14   the same. If one has a valuation of two and the other

15   a valuation of one, then the relative valuation of the

16   first is twice as great as the first. If an instance

17   has a valuation of 0.924 percent of another, that

18   means that it is worth slightly more than 92 percent

19   of the value of the first.

20   Q   So, for example, with a relative valuation

21   of 0.924 for public television, that would mean, on

22   average, that a subscriber instance attributed to

public television is worth 0.924, or 92 percent, of a

subscriber -- the average subscriber instance of a

non-public television signal, correct?

     A   Right. There's a slight discount.

     Q   Now, how did you derive --

     JUDGE GULIN: Let me just make sure I'm

real clear on this. If the CARP in '92 had used this

type of methodology, they would have come up with 5.9

for Public Television if they had considered -- if

they had used the methodology and they had considered

that Public Television carriage instances, subscriber

instances were the same exact as non-Public Television

carriage instances.

     THE WITNESS: Right.

     JUDGE GULIN: But because they came up

with 5.5 instead of 5.9, that implies that even if

they had used that methodology, they had discounted it

some way.

     THE WITNESS: That's right.

     JUDGE GULIN: Is that basically it?

     THE WITNESS: That's exactly right.

     JUDGE von KANN: On that happy note, I

think it might be good to take a little break, because

I have a feeling you're not within a few minutes of

wrapping up.

MR. DOVE: I'm not within a few, though I

would think maybe 15 minutes. But taking a break

would be a good idea.

JUDGE von KANN: Coffee is calling some of

us more urgently than others, so why don't we take 15

minutes and then try to wrap it up in 15 when you come

back, okay?

(Whereupon, the foregoing matter went off

the record at 10:41 a.m. and went back on

the record at 10:54 a.m.)

JUDGE von KANN: Okay.

BY MR. DOVE:

Q   Dr. Johnson, just to be clear, when we are

talking about the relative valuation of subscriber

instances, we're kind of using that a little bit as a

shorthand. Is it true that what we are really talking

about is the relative valuation of the programming on

the subscriber instances?

A   Yes, the programming on those instances as

1   reflected, for example, in the equations on page 15.

2   Q   How did you derive a relative valuation of

3   the programming on subscriber instances from the 1990

4   to '92 award?

5   A   At the top, I say that the PTV award

6   should be equal to the number of PTV subscriber

7   instances weighted by its relative valuation divided

8   by non-PTV subscriber instances plus the PTV

9   subscriber instances times its relative valuation.

10   Now, the simplest case is suppose the

11   relative valuation is one of 100 percent parity, that

12   Public Television has the same valuation on average as

13   all other programming. In that case, in the equation,

14   the PTV relative valuation would be one.

15   So you would simply have PTV subscriber

16   instances divided by non-PTV subscriber instances plus

17   PTV subscriber instances, very simple. Again, it's

18   simply to share the 5.9 percent share shown in the

19   earlier table 4.

20   Q   On table 4 --

21   A   Right. So if --

22   Q   Just to be clear, on table 4 for 1992?

1   A   Yes.   Then you would -- taking these

2   subscriber instances shown for 1992, you would get a

3   PTV award of 5.9 percent.

4   Q   But, again, that is not what is happening.

5   What we're --

6   A   That is not what happened.   That would

7   have been a case of parity again, evaluation for

8   Public Television, the same as evaluation on average

9   for other programming.

10   Now, in the actual 5.5 percent award, the

11   CARP took into account a whole range of factors again,

12   a voluminous record, a reasonably based decision in my

13   view.   But it carried with it an implication about

14   relative valuation.

15   It implied that Public Television was to

16   be valued at something less than other television, not

17   100 percent, not parity, but a discount factor, if you

18   will, applied such that the appropriate Public

19   Television award would not be 5.9 percent but somewhat

20   below that by a discount driving the award to a level

21   of 5.5 percent.

22   And so the implicit discount rate or the

relative value of Public Television programming, again

in comparison to the rest, is not 1.00 but is .924,

you know, roughly an eight percent reduction.

Q   As I understand it, is that what is shown

on the top of page 15?

A   Right. The third equation shows that with

those valuations thrown in, that the PTV award, then,

adjusted for differences in program valuation would be

five and a half percent.

Q   Now, once you determine the relative

valuation between PTV and non-PTV subscriber instances

implied by the 1990 to '92 award, what did you do

next?

A   Then I took the subscriber instance data

for 1998 and 1999, plugged them into the same

equations using that same discount, the .924, and I

came then to the figure shown at the bottom of page

15, an award of 10.3 percent for 1998 and 10.7 for

1999.

Q   Dr. Johnson, if you could turn to table 5

on page 16? The table is entitled "Relative Value of

PTV Distance Signals and Shares of Subscriber

1   Instances of Distant Signal Carriage." What does this

2   table demonstrate?

3   A   It recapitulates and puts into a

4   convenient format the major comparisons from the

5   proceeding. It shows again that were we to assume

6   parity 100 percent, we would have come out with an

7   award of 11 percent for 1998 instead of the 10.3.

8   Again, the reduction is due to the fact that we do not

9   assume parity in the final case, but we assume the

10   discount down to 92.4.

11   Again let me emphasize that when we're

12   talking about relative value, we're talking about in

13   that very simple case the value of that one instance

14   of carriage had for Public Television. How is that

15   valued relative to all the rest, to the 999?

16   And if the value is the same on average,

17   then we would say that the relative valuation is the

18   same. If it were only one-half as valuable as

19   everything else, then its relative value would fall.

20   That is a big concept. I hope it is

21   understandable.

22   Q   Just to be clear, again looking at table

1   5 and looking at your recommended awards of 10.3

2   percent for Public Television in 1998 and 10.7 percent

3   for 1999, doing the simple math, that means the

4   recommended awards for all of the other claimant

5   groups put together would be 89.7 percent for 1998 and

6   89.3 percent for 1999. Is that correct?

7   A   Yes.

8   Q   Now, can you do anything further with this

9   approach? I mean, can you use this approach to

10   calculate the shares of, say, sports or syndicated

11   shows? I believe you mentioned something about this

12   earlier but just to be clear --

13   A   No. We cannot compute the shares

14   directly, but the one thing that we can say is that

15   the kind of programming that was transferred to the

16   cable networks is the programming whose award share

17   would be adjusted downward.

18   Because those program suppliers now have

19   become more dependent on the free market cable network

20   arena, that now is a source of revenue, an

21   increasingly important source of revenue. And their

22   dependence on the compulsory license pool has declined

1   as a consequence, in large part because of the

2   departure of WTBS.

3   And those award shares, then, are the ones

4   that would be appropriately reduced here to reflect

5   the simple fact that those program claimants are less

6   dependent on the compulsory license pool now or in

7   1998 than they were in 1992.

8   There's the simple shift to the cable

9   network. Our market simply argues in favor of a shift

10   in awards, a smaller percentage award for the

11   compulsory license pool with these suppliers now

12   becoming more dependent on the cable network market.

13   Does that mean they are worse off?   Not

14   necessarily, no, no. Maybe they're better off in the

15   cable network market.   It simply recognizes that a

16   seismic shift has occurred in the relative dependence

17   on the compulsory license pool and the award structure

18   should be correspondingly modified.

19   It turns out that Public Television is a

20   more important factor now in a purely relative sense

21   in the compulsory license pool than it was in 1992.

22   Why?   Because of the shift, the massive shift, in

1   categories of some programming, movies and syndicated

2   fare particularly, to the cable network markets,

3   nothing difficult to understand the number of shows

4   that shift clearly.

5   And so we can not now compute precisely

6   the shares for other claimants with this methodology,

7   but certainly the implications of using my methodology

8   are clear now.

9   Q   Let's go back to the .924 relative

10   valuation figure for a moment. You spend a few pages,

11   I guess pages 16 through 23, talking a little bit more

12   about that relative valuation figure. Could you just

13   briefly summarize what you are trying to get across on

14   those pages in connection with the reasonableness of

15   the .924 number?

16   A   Yes. I would like to go, if I might, just

17   very quickly to table 6. I want to try to pin down

18   average value just a bit. These are hypothetical

19   numbers that are useful in understanding average

20   value.

21   Let's suppose we have Public Television

22   being carried by 50 cable systems, one signal apiece;

1   instances of carriage, 50. The cable operators, let's

2   say, ascribe an average signal value of $20. It comes

3   out to 1,000.

4   Q   That's at 50 instances times --

5   A   Right, right. And we do the same for the

6   second and the third. And we come out to a total of

7   1,268. And average value per signal was 16.7.

8   Q   And that's the average value for Public

9   Television signal in your hypothetical?

10   A   Right, right. Now, we have 200 non-PTV

11   instances as a first distant signal and much more

12   carriage of commercial than noncommercial, 200 as

13   against 50; the first distant signal, instances of

14   carriage, 200, $25 average signal value. And we add

15   the figures up, the 5,000 and 3,000, and we get

16   10,550.

17   Now, what do we -- and when we then divide

18   by instances of carriage in both cases, we come out

19   with an average value per signal for Public Television

20   that is actually slightly higher than the figure for

21   commercial.

22   Q   Well, let me --

1   A   I hope this does not -- go ahead.

2   Q   Let me try to break it into pieces just to

3   make sure everyone understands. As I understand it --

4   and there are two sections of this table. The top

5   section talks about a hypothetical situation involving

6   Public Television signals.

7   You've got 50 cable systems carrying one

8   Public Television signal. That means 50 times one is

9   50 instances of carriage and an average value for

10 those signals of $20, giving you a total signal value

11 of $1,000.

12   Then you do the same thing for ten cable

13 systems that carry two Public Television signals

14 hypothetically. Obviously it's a lower -- well, you

15 attribute a lower average value to that second Public

16 Television signal.

17   A   Right.

18   Q   And you make these computations, and you

19 determine a total, an average value per signal for

20 Public Television. Is that right?

21   A   Right.

22   Q   And then you did the same thing for

1   hypothetical non-Public Television signals, where you

2   imagine a larger number of cable systems that carry a

3   distant commercial signal. You attribute a value, an

4   average value, of $25, as opposed to the $20 for

5   Public Television, a higher average value.

6   A   A higher value.

7   Q   You multiple that, and you do the same

8   thing. The second non-PTV signal, you attributed an

9   average value of 15, which is higher than the 11 for

10   Public Television. And you do all the math in this

11   table, and you get an average value per signal of

12   non-Public Television of 16.2, which is less than

13   16.7.

14   A   Right, right.

15   Q   Now, that's what's in the table. Why is

16   that relevant or why is that important?

17   A   Why is that relevant? Because the first

18   PTV signal is weighted more heavily. Suppose that

19   that were the only signal carried by -- in the Public

20   Television arena. It would have a weight of 100. And

21   so that full $1,000 value would enter into the

22   average.

1   For non-Public Television, the weight for

2   the first signal is much less than 100 because you

3   have all those other signals being carried.   That

4   reduces the weight of the first.

5   The first signal becomes relatively less

6   important.   And that affects the average value per

7   signal.   And the critical point here, then, is that

8   even though the valuations are in every case higher

9   for   the   commercial   signals   for   each   channel,

10   nevertheless, the average value for Public Television

11   is higher, 16.7 as against 16.2, we have a situation

12   greater than parity.   If we had parity, then both

13   would be 16.2 or 16.7.

14   Here we have the case of Public Television

15   actually enjoying a kind of premium because of the way

16   that   the   signal   values   are   weighted   in   the   two

17   sectors.

18   Q   Now,   again,   I   mean,   this   is   just   a

19   hypothetical.

20   A   This is perfectly just hypothetical.

21   Q   As   I   understand   it   --   wait   until   I've

22   finished so the record is clear.   As I understand it,

1   Dr. Johnson, your point of putting this table in here

2   was just to demonstrate, corroborate, if you will,

3   that the .924 relative valuation, the relative

4   valuation of programming on subscriber instances that

5   is close to parity, that that is a reasonable

6   assumption. Is that right?

7   A   Yes. I'm trying to illustrate again the

8   point about the concept of parity in relative program

9   value, here a slight departure from parity but here in

10   favor of Public Television.

11   Q   Now, this is a hypothetical. Did you find

12   any other or do you have any other corroborating

13   support for a relative valuation in the vicinity of

14   parity, of course, other than the fact that it was

15   derived from the 5.5 percent award?

16   A   Yes. If we go to table 7, we have an

17   interesting distribution of distant signals by cable

18   systems, showing again the importance of weights

19   ascribed to particular signals.

20   In 1998, 333 cable systems carried a

21   single Public Television signal, with a total of 4.3

22   million subscriber instances. Another 24 carried 2,

1   for a .7 million subscriber instance level and a

2   subsequent share of 14 percent.

3   Now, these numbers, the distant signals

4   are full distant signals. I have excluded all partial

5   distant signals. And we see that a number of cable

6   systems carry one or, at most, two full Public

7   Television distant signals.

8   Consequently, the subscriber instance

9   share for that first signal of 86 percent is quite

10   high, you know, reflecting the fact that if you

11   carried very few, then the weight given to that first

12   one is very high, easy enough to understand.

13   So now we have that in comparison to

14   non-Public Television. Many, many more systems carry

15   a commercial distant signal, 1,081 distant signal

16   commercial, with a far larger number of subscriber

17   instances than for Public Television. And that first

18   signal gets a share of 61 percent.

19   You will notice that the cable system

20   carries many more commercial signals. You know, many

21   carry five, six, seven and with declining shares.

22   Now, we have noted many times in the past

1   that when cable operators carry a public station that

2   they value it highly. That was shown in the Bortz

3   figures of relatively high valuations, 12-14 percent,

4   for public stations when they are carried.

5   So we ask the question, well, when these

6   signals are carried, Public Television signals, how

7   can we look at the question of average valuation?

8   It may be true that only one public signal

9   is carried, but if that signal is valued high, that

10   will affect the average that would be used in

11   computing the award.

12   If, for example, in my simple case,

13   suppose that one PTV signal had been valued not at

14   parity but at twice, at two relative to the 999, then

15   that award would be doubled. It might be a small

16   award, but it would be doubled because of that

17   increase in relative valuation.

18   Now, here we see the importance of that 86

19   percent weight because let's suppose that the public

20   signal is valued at 100 and we take the weight of 86

21   and we get 86. That now is the weighted share of the

22   100.

1   And we ask the question, given the fact

2 now that we have a weight here for the first

3 commercial signal of 61, what would the value of that

4 commercial station signal have to be in order to come

5 out with the same 86? And it turns out it would have

6 to be 41 percent higher to carry the same weight in

7 computing average as the public signal.

8   That is because we have fewer distant

9 signals being carried beyond the first in the top row.

10 We have a very high weight for that first signal.

11   And this suggests that, indeed, parity is

12 reasonable. You would have to again have a very

13 substantial premium for the commercial signal in order

14 to provide the same weight in the computation of the

15 average.

16   Q   I don't want to belabor this point

17 because, again, I am sure that others may question you

18 about it, but, as I understand it, again, this table,

19 table 7, the purpose of this table is, again, simply

20 to corroborate your .924 relative valuation that has

21 been derived from or the 5.5 percent award from the

22 '90 to '92 proceeding. Is that right?

1   A   Yes.   It's simply to lend support to the

2   notion that something like parity seems reasonable.

3   This table 7, in summary, is helpful because it shows,

4   first of all, the numbers of signals actually carried

5   by cable systems on the left.

6   It shows cable operators voting.   These

7   are all fully distant signals on the left.   It shows

8   that, indeed, they value highly non-Public Television

9   programming.   They   carry   enormous   amounts   of

10   commercial programming relative to Public Television.

11   Even so, when we look at relative values,

12   as shown, again, back on the hypothetical table 6,

13   where, again, non-Public Television was enormously

14   more important just in looking at the numbers.

15   Nevertheless, you come out with average

16   values per signal or the programming on that signal

17   roughly comparable because, again, we're talking about

18   averages.

19   JUDGE von KANN: Mr. Dove?

20   MR. DOVE: Yes?

21   JUDGE von KANN: We have had about an hour

22   and a half of --

1   MR. DOVE: One last question. It's kind

2   of a summary.

3   JUDGE von KANN: We do need to kind of

4   bring it to a head.

5   MR. DOVE: I understand.

6   JUDGE von KANN: Okay.

7   BY MR. DOVE:

8   Q   In summary, Dr. Johnson, what do you

9   believe are the principal factors that justify your

10   proposed awards to Public Television of 10.3 percent

11   in 1998 and 10.7 percent in 1999? We don't need to go

12   into any great depth.

13   A   Right, right.

14   Q   We already have. But just kind of in

15   summary, what are those principal factors?

16   A   There has been a massive transfer of

17   programming from the compulsory license pool to the

18   cable network market. And, indeed, that's why we're

19   here. Had there not been that transfer, we probably

20   would have achieved a voluntary agreement along the

21   way. But it is because of that shift that we're here

22   to face the task of devising a new award structure.

And in my analysis, I have shown how looking at subscriber instances of carriage, taking into account differences in subscribers' sizes and taking into account relative valuations between public and commercial programming that awards, very substantially higher than before, to be sure, but awards of 10.3 percent and 10.7 percent for the years 1998 and 1999, respectively, would be appropriate.

MR. DOVE: I have no further questions.

JUDGE von KANN: Okay. Mr. Stewart, are we starting with you?

MR. STEWART: Yes. At this time, Mr. Chairman, we have no questions.

JUDGE von KANN: Okay. I guess, Mr. Tucci, that means you're up.

MR. TUCCI: Good morning, Dr. Johnson.

THE WITNESS: Good morning.

MR. TUCCI: My name is Michael Tucci. I am counsel to the claimant group referred to as Program Suppliers.

THE WITNESS: Yes.

CROSS-EXAMINATION

1   BY MR. TUCCI:

2   Q   Let's turn to table 8 to start with, if

3 you wouldn't mind. Actually, if you don't mind, I may

4 use the board behind you a little bit.

5   On table 8, we see, do we not, that in

6 1992, the PTV share of Basic that you have identified

7 there is 2.1 percent, right?

8   A   Yes.

9   Q   And you previously testified that the 1992

10 award is 5.5 percent, right?

11   A   Yes.

12   Q   And the difference between those two

13 numbers is 3.4 percent, right?

14   A   Yes.

15   Q   The first math test I've passed.

16   A   That's right.

17   Q   Now, that suggests to me and I assume it

18 suggests to you that part of the award to PTV that was

19 made in 1992 was funds that were actually paid into

20 the royalty pool based on the carriage of non-PTV

21 distant signals, right?

22   A   No. That characterization is misleading.

1   Q   Well, correct it if you wouldn't mind.

2 Where did the money come from? Let me ask you that

3 question.

4   A   First of all, it's impossible to identify

5 precisely the amounts paid in by specific categories

6 because of the sliding scale nature of the fee

7 structure. The amount paid for the carriage of one

8 signal, an independent signal, depends on what else is

9 being carried. And so there is there an ambiguity

10 about associating Public Television with a specific

11 figure.

12   But, more important, I emphasized at the

13 beginning that we must strive to achieve outcomes that

14 resemble, that reflect, that take into account the

15 nature of marketplace forces.

16   And the amounts paid into the pool under

17 the fee schedule certainly do not reflect amounts

18 resembling what you would expect in the marketplace.

19   Those fee charges are based on a mandated

20 fee schedule of .25 percent for DSE, for Public

21 Television .25. Is that the figure that would obtain

22 in a free market? Well, I would expect not? That was

1   a figure mandated by statute. It could have been .50.

2   It could have been .1.

3   Is a full DSE one for an independent

4   station? Is that -- four times the amount for a

5   public station, is that -- would the marketplace

6   provide that? Well, certainly one wouldn't think so.

7   And the earlier proceedings have led to the rejection

8   of this notion of fees being paid as a reflection of

9   market forces being appropriate.

10   Now, I suppose Congress could have said

11   that, you know, Public Television should have --

12   should get back just what it pays in. Let's suppose

13   it had no sliding. It simply could have said, "We are

14   going to have a separate, a shared pool. We're going

15   to say .25 for Public Television, no sliding scale,

16   just .25 because, you know, they should get what they

17   pay."

18   Well, the Congress didn't do that. They

19   said, "This is going to be a pool. It's going to be

20   a sharing. We're going to set these figures." And no

21   one, I would guess, who was involved in that decision

22   would   have   said   that,   indeed,   these   reflect

marketplace forces. These are very crude measures.

We have to go beyond the level of fees paid in to

obtain a reasonable basis for the setting of awards.

And, indeed, that has happened in every

case. The CARP has set --

Q   May I interrupt you there? We are getting

a little far afield from the question I actually

asked.

A   All right.

Q   Your testimony and I think I can say in

table 8 says PTV share of Basic of 2.1 percent. Is

that an accurate mathematical calculation?

A   Well, accurate in the sense that if you

add the numbers --

Q   In that marketplace, we are talking about

an accurate mathematical calculation.

A   Well, no, no because the amount actually

paid by a particular cable system for a particular

signal depends on what else that program operator is

also doing because of the sliding scale.

Indeed, if the operator carries no distant

signals, then the operator still pays one DSE, the

1   minimum fee. And that really does distort things,

2   which is one reason I like to just stay away from fees

3   pay. But that shows up on my table 1, where you'll

4   note a 9.3 percent for Public Television.

5   Q   Right. We'll get to that.

6   A   Yes, I know.

7   Q   My question is very simple.

8   A   Yes.

9   Q   You identified the PTV share of Basic to

10   be 2.1 percent in 1992. Is your testimony accurate in

11   that regard?

12   A   Yes.

13   Q   Thank you.

14   A   These are the figures, yes. As reported

15   by the CDC, they are accurate.

16   Q   And you previously testified that it's

17   your knowledge that the reward to PTV in 1992 was 5.5

18   percent of the fund?

19   A   Yes.

20   Q   Of the total royalty fund?

21   A   Yes.

22   Q   And the mathematical exercise that I just

did on the board behind you suggests that there is a

3.4 percent difference between those two numbers.

A   Yes.

Q   And that's correct?

A   Yes.

Q   That 3.4 percent and the funds represented

by   that   3.4   percent   are   funds   other   than

PTV-identified fees, correct?

A   No.   If you could make all of the other

adjustments   so   that   you   --   again,   because   of   the

sliding scale problem, if you could somehow circumvent

that problem, you might come out with some figure that

would assure the difference between the actual award

and the amounts actually paid in if you could solve

that allocations problem.

Q   And we'll get to the allocations problem.

A   All right.

Q   But   I   am   trying   to   be   as   simple   as

possible so that everybody understands this.

JUDGE von KANN: Let me ask a question

which might help clear this up for me. Can you tell

me in a sentence, what does the 2.1 percent labeled

"PTV share of Basic" represent? What does that mean?

THE WITNESS: That means of all of the fees that go into the royalty pool and that CDC tracks back to payments made by individual broadcasters, that they compute a 2.1 percent share for Public Television. And those figures are shown in the printouts that CDC issues.

JUDGE von KANN: Is that another way of saying that CDC calculates that 2.1 percent of the Basic Fund was paid in solely and unmistakably on account of PTV?

THE WITNESS: I would say no.

JUDGE von KANN: No?

THE WITNESS: 2.1 percent is attributed to Public Television with the proviso, with the footnote that adjustments have to be made, arbitrary adjustments, to accommodate the distortions created by the sliding scale nature of the payments.

JUDGE YOUNG: I think at one point in your testimony, you accept the fact that it's arbitrary but those allocations are fine.

THE WITNESS: Fine.

1   JUDGE YOUNG: It's acceptable.

2   THE WITNESS: Well --

3   JUDGE YOUNG: It's acceptable for at least

4   other portions of your direct testimony.

5   THE WITNESS: Well, it's useful because if

6   you look at the change, then also you get a very large

7   change. You get a doubling. You get a 152 percent

8   change. And in that sense, we probably see a sort of

9   corroborative evidence that it's one indicator that

10   shows a very strong increases, both in identified

11   distant fees and in total distant fees.

12   JUDGE YOUNG: What I'm referring to on

13   page 8, where you identify the issue that there is an

14   arbitrariness associated with the allocation.

15   THE WITNESS: Yes, yes.

16   JUDGE YOUNG: As I read the testimony, it

17   says, "An allocation necessarily arbitrary must be

18   used to identify each station with each specific

19   payment for this pool. CDC allocates a total fee paid

20   by the cable operator among the stations' proportion

21   to their DSE values."

22   As I read that, you're sort of saying, "We

1 know it's arbitrary. We know there's some amount of

2 adjustment." So any allocation of this formula was

3 correct?

4   THE WITNESS: That is right. That is --

5   MR. TUCCI: Judge Young, we are going to

6 get into that in pretty good detail.

7   JUDGE YOUNG: Okay.   I'll let you go

8 ahead.

9   MR. TUCCI: Just so you know.

10   JUDGE YOUNG: Did I ever doubt it?

11   MR. TUCCI: Get the coffee out.

12   BY MR. TUCCI:

13   Q   Would it be a fair statement to say that

14 you can -- I heard what you testified to earlier

15 regarding the sliding scale and the allocation that

16 exists.

17   But we could go to the Copyright Office

18 down the hall here, and we could pull out all the

19 statements of account, right? And we could look at

20 them. And we could add up all of the fees that were

21 paid into the fund for the carriage of PTV, couldn't

22 we, the aggregate dollar amount?

1   A   You would have the figures for the

2   stations actually carried by the cable operator and

3   the total fee paid by the cable operator for those

4   stations collectively.

5   There would still be the problem of

6   identifying portions of that payment with the

7   individual stations. And you inevitably run into the

8   problem just referenced that you have a sliding scale.

9   And so you arbitrarily allocate among the signals.

10   Q   But, at a minimum, we could find the

11 amount of money actually forwarded. And there may be

12 some amount over and above that that was actually

13 allocated to PTV, but it wouldn't be an amount below

14 that, correct?

15   A   No, that's not true either. You know,

16 suffice it to say that given this problem of

17 allocation and the fact that these figures don't

18 measure marketplace prices anyway, you know, the

19 previous CARP said, "We're not going to do this.

20 We'll give Public Television five and a half percent."

21 And previous CARPs have done the same.

22   But for my purposes, the importance of

1   table 8 is simply showing a dramatic increase in fees

2   paid. Given the arbitrary element, the fact remains

3   that there has been more than a doubling, much more

4   than a doubling, even in the identified distant fees

5   paid, let alone the total distant fees paid.

6   Q   Maybe the easiest way to do this would be

7   to assume hypothetically that your table is correct.

8   Can we do that?

9   A   Correct. Let's go ahead. So let's --

10   Q   We'll assume that the identified PTV fee

11   for 1992 is accurate in table 8 and it's 2.1 percent

12   of the total. Okay? Can we do that for purposes of

13   my exercise?

14   A   Go ahead.

15   Q   I think you have previously testified that

16   the 5.5 percent is factually accurate, the award to

17   PTV in 1992.

18   A   Yes.

19   Q   Can we, then, for the purposes of this

20   exercise   call   the   3.4   percent   difference

21   non-PTV-identified?

22   A   Following your line of argument --

1   Q   It's a question.

2   A   That's all right. Fine.

3   Q   And the non-PTV-identified would include

4   independents, commercial, fees that were paid for the

5   carriage of something other than PTV?

6   A   Proceed.

7   Q   Is that a yes?

8   A   Accepting the premise, then I see the

9   logic of your argument.

10   Q   And you would agree that WTBS, I assume,

11   as it existed in 1992 was not a PTV signal?

12   A   Right. Yes, yes.

13   Q   So the essence of my question -- it's a

14   very simple one -- is that in the non-PTV-identified

15   3.4 percent, we would have funds that were contributed

16   based on the carriage of WTBS, correct?

17   A   Yes, in accordance with your logic.

18   Q   In accordance with your first theory,

19   since WTBS is no longer here, we would have to

20   actually reduce the PTV award of 5.5 percent to take

21   out that amount of the 3.4 percent that was attributed

22   to the payment of funds for the carriage of WTBS?

1   A   Yes. And here is where I must emphasize

2   that this line of argument is misleading. I can argue

3   in terms of the simple model that Public Television is

4   really not affected by all of this. It's not carried

5   on WTBS. And to maintain its share, you would

6   increase the award to over six percent.

7   I am not concerned in the simple model,

8   nor was the previous CARP, for that matter, in

9   identifying award levels or setting award levels in

10   accordance with fees paid.

11   Fees paid were deemed to be irrelevant

12   because they don't measure marketplace forces. It's

13   simply sort of something you look at to see the change

14   over time. You can say, "Gee, whatever Public

15   Television paid, it's paying more of a total now."

16   But the whole basis here for the

17   discussion is irrelevant. We simply cannot take fees

18   paid as the basis for establishing an award level.

19   And that point has been made repeatedly by previous

20   CARPs.

21   Q   And in the 1992 award, I think, if I can

22   characterize your testimony, it looked at a multitude

1   of --

2   A   Yes, as it should here.

3   Q   And it attempted to come to a certain

4   market value?

5   A   Exactly, as should be the case here. And

6   I'm suggesting that what I presented is one important

7   ingredient in the establishment of an award structure

8   that moves in the direction of reflecting the

9   marketplace.

10   Q   Now, I guess you have to bear with my

11   non-economist's mind here. If I take your model, the

12   simple model -- that's all I'm talking about here. We

13   haven't gotten to the complicates stuff yet. We're

14   just talking about the simple WTBS issue. Okay?

15   If I run it through my mind to its logical

16   conclusion and, say, in 25 years from now, we're

17   sitting in this room and the only thing left is PTV,

18   then you would agree that PTV's share of the fund

19   would be 100 percent and that 100 percent would equal

20   the fees that are paid into the fund for the carriage

21   of PTV, correct?

22   A   Yes. And I should have mentioned that

1 before. At the extreme, Public Television would have

2 100 percent. Certainly long before that point,

3 Congress would say, you know, "We really have to do

4 something about this fee schedule. You have all of

5 these cable systems paying one percent, and they're

6 not even carrying anything. You clearly have to do

7 something." And obviously Congress would do

8 something.

9   Q   And if at the end of the day the carriage

10 hadn't changed for PTV in that 25 years and the

11 subscribers hadn't changed --

12   A   Right.

13   Q   -- in those 25 years, we would actually be

14 at the same absolute dollar number that is represented

15 by the 2.1 percent, correct?

16   A   Sure. If Congress did nothing and all

17 other program sources left the compulsory license

18 pool, Public Television would end up with, you know,

19 all of these minimum fees.

20   But I would assume that someplace along

21 the line as station types start dropping out, other

22 superstations, that Congress would say, "We really

1   need to revisit this issue of what these fees ought to

2   look like." That's all I can say.

3   Q   And looking at it as well, I suppose, from

4   the reverse, from a little bit of the mirror image

5   that if we're here 25 years from now and PTV has

6   remained the same but we've added a whole bunch of

7   distant independent stations, then we would actually

8   have to lower the percentage to PTV --

9   A   That's right.

10   Q   -- in order to be consistent with your

11   argument?

12   A   It's fairly symmetrical. If we were to

13   take the simple model, go to the 80, the higher award,

14   and now we add back in and let's suppose we go to 120,

15   you're absolutely right. The award goes down.

16   Q   We could actually test that. We could

17   look at historical data in order to determine whether

18   that has happened in the past, couldn't we? I haven't

19   done it, but --

20   A   Historical data but to look at, I don't --

21   Q   Well, we could look at the award in 1989

22   vis-a-vis the carriage of PTV, and we could look at

1   the award in 1992 vis-a-vis the carriage of PTV. We

2   could determine whether the CARP did anything like

3   that, couldn't we?

4   A   Yes, sure, and especially determine to

5   what extent the awards tracked fees paid or did not

6   track fees paid over time, yes.

7   Q   And to the extent, I suppose, that there

8   may have been added independent stations in that

9   particular time frame and what effect that had on the

10   CARP's decision-making, whether it actually reduced

11   the award to PTV based on an increase in --

12   A   No.   I'm not saying that the award did

13   reflect that. I'm saying that, in principle, based on

14   my simple model, that if we were here today talking

15   about what to do in face of this vast increase in the

16   size of the compulsory license pool because of

17   stations being added, then we would be facing the

18   reverse of what we're facing.

19   How the CARP would come out, of course, I

20   don't know.

21   Q   You spoke a little bit earlier about

22   attitudinal versus behavioral --

1   A   Yes.

2   Q   -- approaches. In your view, is behavior

3   more   valuable   than   attitudes   with   respect   to

4   predicting future activity?

5   A   It all depends on the facts at hand. Now,

6   economists would say as a general rule that they

7   greatly prefer the use of behavioral measures because

8   these measures take into account the way the world

9   actually works, not the way businessmen say it works

10   necessarily or say that they would do a certain thing

11   if something else happens, sort of the attitudinal

12   approach, but basically here is the way it happened.

13   And so economists greatly prefer to use

14   behavioral indicators in their statistical analysis.

15   This is not to say that attitudinal approaches are of

16   no value. It depends very much on circumstances at

17   hand.

18   Q   What are the behaviors that we have all

19   been talking about all morning as the behavior of

20   WTBS?

21   A   That is one of the drivers, one of the

22   reasons we're here.

1   Q   And its factual behavior was simply to

2   convert itself from a distant signal, a signal that is

3   carried distantly?

4   A   With an attendant impact on the carriage

5   of signals within the compulsory license.

6   JUDGE von KANN: Dr. Johnson, you need to

7   let the attorney complete the question before you

8   answer.

9   THE WITNESS: Yes. Okay.

10   MR. TUCCI: Thank you.

11   BY MR. TUCCI:

12   Q   Do you know what happened? Do you know

13   what the marketplace reaction was to WTBS converting

14   from a distant signal to a cable network?

15   A   Yes. Most cable operators continued,

16   then, with TBS as a cable network.

17   Q   Over 95 percent, wasn't it?

18   A   Yes. TBS has not seen a reduction in

19   subscribership.

20   Q   What about fees received? Do you know --

21   MR. DOVE: Hold on one second. Let him

22   finish the answer.

1   MR. TUCCI: The pause, I don't know

2   whether the pause was the end or a pause. So I

3   apologize.

4   JUDGE von KANN: Do you need to complete

5   that answer, Dr. Johnson?

6   THE WITNESS: Now I forget.

7   JUDGE von KANN: Do you want to restate

8   the question, Mr. Tucci? Let's get it.

9   BY MR. TUCCI:

10   Q   Do you know what impact WTBS' conversion

11 had to its income?

12   A   To its net income, no.

13   Q   Gross receipts.

14   A   No.

15   Q   Do you know whether it receives more in

16 license fee funds than it did in distributions of the

17 compulsory license?

18   A   Oh, I would guess it receives much more.

19   Q   Go ahead.

20   A   May I?

21   Q   Absolutely.

22   A   Why? Because now we have advertising

1 inserts. And those are valuable to cable operators.

2 They're willing to pay more and especially with a

3 signal as popular as TBS.

4   To local cable operators, of course, the

5 advertising inserts would be very valuable. And so

6 you observe a higher royalty fee. But that doesn't

7 say anything directly about what the market price

8 would be for a signal that does not include

9 advertising inserts.

10   Q   If that was the sole difference, I

11 suppose, right?

12   A   Yes. And program composition perhaps

13 could have changed. I don't know that that's true,

14 but --

15   Q   Let's go to table 1 of your testimony, Dr.

16 Johnson. You identify at the bottom there the source

17 material, CDC spreadsheets, SSF3's from October 15,

18 2002 and supplement October 17th, 2000. Do you see

19 that?

20   A   Yes.

21   MR. TUCCI: This will be PS exhibit 35-X.

22   (Whereupon, the aforementioned

1   document   was   marked   for

2   identification   as   PS   Exhibit

3   Number 35-X.)

4   MR. TUCCI: I hand the witness what has

5   been marked as PS exhibit 35-X.

6   BY MR. TUCCI:

7   Q   I ask you to take a look at those and tell

8   me if they are the spreadsheets that are the source

9   for table 1.

10   A   Source for what?

11   Q   Table 1 information.

12   A   Yes.   I see a total fees generated in the

13   fourth column for each of the two semesters for '92

14   and I assume for the other relevant years.

15   Q   Let's look at the '92 first.   It's on top,

16   and it's in the first part of your table, right?

17   A   Right.

18   Q   Let's concentrate on fees paid. Actually,

19   the first page of exhibit 35-X uses the term "total

20   fees generated" in the third column from the left and

21   "distant fees generated" in the second column from the

22   right.   Do you see that?

1   A   Yes.

2   Q   That is what you mean by "total distant

3 fees paid" on table 1, isn't it? It's actually --

4   A   Yes, different terminology. Yes.

5   Q   And the first page of 35-X is for

6 accounting period, as it states at the top, 1992-1,

7 right?

8   A   Uh-huh.

9   Q   And if we look at the total fees

10 generated, it says 1,473,697, right?

11   A   Yes, for educational.

12   Q   Right, for educational. And that is for

13 a six-month period, right?

14   A   Yes, right.

15   Q   So we would look at the third page of

16 35-X, which has the same sorts of information for

17 accounting period 1992-2, correct?

18   A   Right.

19   Q   And we see 1,456,378 for educational?

20   A   Right.

21   Q   And we add those two together.

22   A   Right.

1   Q   And that's where you're getting your 2.9

2 that appears PTV total on table 1, correct?

3   A   Right.

4   Q   Now, let's look at the second column from

5 the right, which is distant fees generated.

6   A   Right.

7   Q   The distant fees generated are virtually

8 the same but not quite?

9   A   That's right.

10   Q   And if we add those two numbers together,

11 we get basically 2,890,000 basically?

12.   A   Almost it has to be --

13   Q   Rounded to the same number, correct?

14   A   Yeah, yeah, but lower.

15   Q   What is the difference between those two

16 numbers?

17   A   The allocation of the minimum fee in cases

18 where that fee is paid by cable operators carrying no

19 distant signals.

20   Q   So the total fees contains an allocation

21 and the distant fees does not.   Is that my

22 understanding?

1   A   Right, right.

2   Q   Set those four pages aside, if you will.

3   A   All right.

4   Q   And we'll just down to 1997 since it's the

5   next item in the table 1.

6   A   Nineteen ninety-seven, first semester.

7   Q   Correct. And is it fair to say that we

8   have the same information provided in the next four

9   pages that we had in the first four pages? And we can

10   look for educational, and we can see total fees

11   generated of the 1,000,140 for the first accounting

12   period and 1,000,213 for the second accounting period,

13   correct?

14   A   For 1997, yes.

15   Q   And if we look at the right-hand columns,

16   the distant fees generated, we have 1,000,089 and

17   1,000,152 for distant fees generated, similar numbers?

18   A   Yes, yes.

19   Q   All right. Let's set those four pages

20   aside and go on to 1998. When we get to 1998, for

21   accounting periods 1 and 2, we see the total fees

22   generated go to 4,263,000 on the first accounting

1 period, 4,112,000 on the second accounting period, but

2 the distant fees are this time rather markedly

3 different of that column, 1,000,886 and 1,000,793?

4   A   That's right.

5   Q   And I think this is -- correct me if I am

6 wrong, but you have testified about this in your

7 testimony as the "empty DSE," I think is what you call

8 it. Is that right?

9   A   Yes.

10   Q   And is that the reason for the difference

11 between these figures beginning in 1998?

12   A   Yes.

13   Q   And in your view, why don't you explain

14 what you mean by the empty DSE?

15   A   See, the reason that the two figures were

16 very close together in 1992 and, indeed, in 1997, that

17 with the presence of WTBS as a distant signal, many

18 cable operators used their minimum fee requirement to

19 bring in WTBS. That was the distant signal that

20 filled that slot.

21   And there was no serious allocation

22 problem, no empty DSE, but slight. There was a slight

1   difference. And that's why the one figure is a little

2   below the other, distant fees generated slightly below

3   total, because there was a small problem of empty DSEs

4   in 1992.

5   With the withdrawal of WTBS, many cable

6   operators were left carrying no independent signals.

7   Now, they could have substituted perhaps. Most of

8   them didn't, as we see from the data, because the

9   number of independent signals did not rise of --

10   non-TBS signals did not rise much after 1997. So many

11   cable operators were then left with an empty DSE.

12   WTBS was simply the only distant signal

13   they carried. And now we have, then, a substantial

14   allocations problem. What do you do with that minimum

15   fee income not directly attributable to any distant

16   signal?

17   Q   Do you know how it has been allocated by

18   CDC in these --

19   A   Yes. They have tried several approaches.

20   These figures reflect an allocation equally to all of

21   the local stations in the relevant cable market.

22   Q   If we look at the column on the right, the

1   distant fees generated, that is comparable I assume --

2   and you tell me -- to the column on the right in 1992

3   and 1997 in the sense that it is more directly related

4   to the actual fees paid for the carriage of PTV than

5   perhaps the column on the left?

6   A   Well, or -- you know, or for any other

7   station.   It is -- the columns on the right are

8   already -- were shown in the later table that we

9   discuss.

10   Q   Table 8?

11   A   Yes. If now there is an allocation to all

12 local stations, then the PTV allocation increases, as

13 we see in table 1, and you get then, you know, a 9.3

14 percent share of the total.

15   Again, much of this is being driven by the

16 fact that the size of the pool now has fallen. And

17 for the same reasons as before, whether we take total

18 distant fees paid or what I call identified, the size

19 of the relevant pool has fallen.

20   And the PTV share given the arbitrary

21 allocation, it gets its share, I suppose, of this

22 allocation.   CDC doesn't say, "Oh, we're going to

1   exclude Public Television. We're just going to give

2   the money to -- allocate the money to other kinds of

3   stations." But there are lots of -- they could use a

4   weighted system.

5   And, in fact, that system was tried, a

6   so-called prorated system of taking into account the

7   weights from the DSE schedule. But that, for whatever

8   reason, seemed not satisfactory.

9   So the equals allocation procedure is the

10   one embedded in these numbers.

11   Q   And it's fair to say, I think, that even

12   in your testimony, you use the right-hand information

13   in table 8. And I think that you have even testified

14   that that is more reliable because it removes the

15   arbitrary allocation, correct?

16   A   Yes. I might say that the reason for

17   putting in table 1 was to show sort of how misleading

18   the whole fees generated approach is to setting the

19   royalty share. That's --

20   Q   And we continue on in PS 35-X. We have

21   the same four pages for 1998. And we could engage in

22   the same analysis, correct?

1   A   Right, yes.

2   Q   It's no different for that year than it is

3   for the other years?

4   A   Yes. This tracks very well.

5   Q   Okay. Let's look --

6   JUDGE GULIN: I am not sure that the

7   transcript is going to pick up exactly what his answer

8   was to the last question because I think you said "No"

9   and "Yes." The answer to the last question about

10   table 8 being more reliable was yes, correct?

11   THE WITNESS: Yes.

12   JUDGE GULIN: Okay.

13   BY MR. TUCCI:

14   Q   Now, let's look at table 8. In the

15   left-hand column of table 8, it has a year. In the

16   second column from the left, we have PTV-identified

17   fees. And this is the absolute dollar figure,

18   correct?

19   A   Yes.

20   Q   And we have PTV-identified fees in 1992 of

21   2.9 million, '97 of 2.2 million, '98 of 3.7 million,

22   '99 of 3.7 million, correct?

1   A   Yes.

2   Q   And that's the right-hand column of 35-X,

3   correct?

4   A   Yes.

5   Q   And I think you have some other tables in

6   here that show instances of carriage and subscriber

7   instances, correct?

8   A   Yes.

9   Q   And they fluctuate in these four years,

10   but as a general rule, they go up but up slightly. Is

11   that correct?

12   A   For Public Television?

13   Q   Right.

14   A   Yes, yes.

15   Q   Can you explain for me given the fact that

16   subscriber instances went up a little and carriage

17   instances went up a little, why the PTV-identified

18   fees went up, it looks like, what, 60 percent, 70

19   percent between the years 1992, '97, and '98-'99?

20   A   Because   of   another   allocations,   not

21   outside   of   the   empty   DSE,   in   some   cases,   other

22   stations were brought in, like a network station or a

Public Television station, perhaps a Canadian station, to partly fill that DSE.

In other words, if I as a cable operator were going to have to pay for one DSE anyway, then in a sense, if it's for free, I can bring in another network station or Public Television station.

And so there was some of that that occurred, a distortion, a good example of what I mean when I say that we face here serious distortions as a consequence of the arbitrary allocation of fees to particular sources.

Q   Let's consider a hypothetical, if you would. Let's say a cable operator carries two PTV signals distantly and no other distant signals. Under the compulsory license, they would be obligated to pay .5 DSE, correct, .25 for each --

A   That's the only ones they carry. They would pay one.

Q   Correct. They would pay the minimum?

A   They would pay the minimum.

Q   Right. But the carriage, if we didn't have a minimum fee, they would pay .5, correct?

1   A   Yeah, all right.

2   Q   Do you know how CDC allocates that 1.0 DSE

3 in the situation where you have a cable operator

4 carrying less than a full --

5   A   It was allocated to the two Public

6 Television signals. It would allocate a half of that

7 one DSE to one and one and a half to the other. If it

8 were one Public Television and one network, it would

9 also be a half to each.

10   Q   Prior to 1998, was that allocation issue

11 that we just described a major issue with respect to

12 figuring out the fees gen data?

13   A   No. It was the withdrawal of WTBS that

14 helped to trigger a much more serious problem with

15 respect to fees allocation.

16   Q   And that's because you may have had a

17 situation where WTBS was carried and these two Public

18 Television stations, correct?

19   A   That, then, would trigger the sliding

20 scale problem. The alternative is that only WTBS is

21 carried, and then once it has withdrawn, other

22 stations are brought in since in a sense, carriage

1   could be free.

2   Q   But even because the allocation issue

3   exists, we can sort of figure out that perhaps not

4   every cable operator was quite as nifty on their feet

5   after WTBS converted. And we have situations, I think

6   you'll agree, where perhaps they were carrying TBS and

7   two PTV stations and TBS converted and they're left

8   with just the two PTV stations.

9   A   Right. That's true. That's true.

10   Q   Do you think that that issue contributes

11   to the PTV-identified fees going up in 1998 and 1999,

12   when carriage and subscribers did not increase

13   dramatically?

14   A   That was one factor, yes.

15   MR. TUCCI: I think I am through with 35-X

16   for the time being and ask that it be received as

17   substantive evidence.

18   MR. DOVE: No objection.

19   JUDGE von KANN: All right. So received.

20   (Whereupon, the aforementioned

21   document,   having   previously

22   been marked for identification

1   as PS Exhibit Number 35-X, was

2   received in evidence.)

3   BY MR. TUCCI:

4   Q   Let's go back to TBS for just a second.

5 I think at one point in your testimony, you stated

6 that you knew of no events between, no significant

7 events between, '97 and '99 that affected the Royalty

8 Fund?

9   A   Taking into account that the WWOR removal

10 was -- took place in the year preceding.

11   Q   Let's look at table 1 again just for a

12 second if you don't mind. And in the second column

13 from the left, you had listed the overall total. I

14 assume that to be the overall total of distant fees

15 paid?

16   A   Yes.

17   Q   And in 1992, we have 182,400,000. And in

18 1997, we have 148,500,000. Do you see that?

19   A   Yes.

20   Q   That's a drop of what, $34 million in the

21 Fund between those years?

22   A   Yes.

1   Q   And then we have between '97 and '98 a

2 drop of 48 million between those two years, correct?

3   A   Yes.

4   Q   I take it from your statement and your

5 testimony that you know of no other events, you have

6 done no analysis to determine the exact effect, if it

7 could be determined, of WTBS' departure on the Royalty

8 Fund, have you?

9   A   Yes.   This was a very rough first-cut

10 analysis.

11   Q   In fact, from this table, we can discern

12 that between 1992 and 1997, there was a substantial

13 drop in the royalties paid between those years as

14 well, can't we?

15   A   Would you repeat the question, please?

16   Q   We can determine from your table 1 that

17 there was a substantial drop in royalties paid between

18 the years 1992 and 1997, correct?

19   A   Yes.

20   Q   In terms of subscriber instances, I think

21 that your whole analysis is built on the notion that

22 subscriber instances -- did you call them a vote?

1   A   Yes, as a general matter, with exceptions.

2   That is as close as I have been able to come to to a

3   measure that does reflect choice, not a perfect

4   measure, to be sure.

5   Q   And in your analysis, you counted one vote

6   equally, didn't you, each vote equally?

7   A   No.   That's the point of looking at

8   relative program valuation.   And one instance of

9   carriage isn't necessarily the same as the other.

10   That's what I'm talking about when I get back to the

11   issue of parity.

12   Q   Did you factor into that analysis the fact

13   that a cable operator pays four times as much for an

14   independent signal than it does for a PTV signal?

15   A   Not directly.   I was much concerned about

16   the way the peak schedules might itself affect the

17   choices. You know, surely -- you know, to the extent

18   that the price paid affects decisions about

19   purchasing, that's certainly a fundamental -- a

20   phenomenon, you know, of price affecting amounts sold.

21   And I considered what would be reasonable assumptions

22   about · demand   elasticities   for   various   program

1   categories.

2   And I assume that the sensitivities would

3   be roughly the same across program categories so that

4   any change in one would also be reflected in the other

5   so that the shares would not drastically change so

6   that the share of Public Television to the total would

7   remain relatively constant, even with some changes in

8   fee structures. That was about as close as I could

9   get.

10   The attractiveness of the instances of

11   carriage approach was that at least it gets around

12   this problem of the arbitrary allocations and the

13   sliding scale nature. So we're one step much closer

14   to marketplace outcomes.

15   Q   Well, we talked about behavior earlier.

16   A   Yes.

17   Q   And we're talking about cable operator

18   behavior.

19   A   Yes, yes.

20   Q   And I assume that you would agree that

21   price is a factor in cable operator behavior, isn't

22   it?

1   A   Yes, yes, yes. But here it's relative

2   behavior. Price may affect one share price-wise. It

3   would also affect others. But if all purchases fall

4   or decline because of a rise or fall in the fee

5   structure, the shares would remain relatively

6   constant. That's the critical component here.

7   Q   I want to talk about price. Would we

8   expect as a matter of economics that if the

9   marketplace perceived the value of a particular

10   product or commodity to be greater than its price,

11   that we would expect it to be selected more often than

12   the norm, all things being equal. Correct?

13   A   Yes.

14   Q   Let's look at a couple of these tables in

15   the middle.. Let's look at table 2. I'm sorry. I

16   don't think I want to look at table 2. I want to look

17   at table 3, which is entitled "Average Instances of

18   Distant Signal Carriage Within the Basic Fund." Why

19   did you subtract for 3.75 Fund and Syndex instances

20   from these figures in table 3, Dr. Johnson?

21   A   Because I wanted to recognize the fact

22   that Public Television is not entitled to draw from

1   the 3.75 Fund.

2   Q   But isn't it true that all of this used a

3   figure, 1992, that all 7,482 total instances of

4   carriage include total instances of basic carriage?

5   A   Yes.

6   Q   And all cable systems pay the Basic fee.

7   And we have discussed that, --

8   A   Yes.

9   Q   -- the minimum fee?

10   A   Yes, sir.

11   Q   And on table 4, the same would be true

12   with subscriber instances as well, correct?

13   A   Yes.

14   Q   All of those subscribers would be

15   subscribers to the Basic Fund?

16   (No response.)

17   BY MR. TUCCI:

18   Q   Now, as I understand your testimony, Dr.

19   Johnson, you have made no attempt to link this change

20   in share that you have testified about with a change

21   in market value. Is that a fair statement?

22   A   I don't understand the question. Could

you rephrase the question?

Q   I'll try. This isn't a market analysis, is it, a market value analysis?

A   I think market value --

JUDGE GULIN: I am not sure what you are referring to now. Are you referring to the fee generation shares?

MR. TUCCI: I am referring to the shares that he said are applicable to the PTV in this proceeding, 10.3 percent and 10.7 percent, the share of the funds.

THE WITNESS: Those are the shares I compute as applicable to the Basic Fund.

BY MR. TUCCI:

Q   Based primarily on the award in 1992 or using the award in 1992 --

A   As a foundation.

Q   I'm sorry?

A   As what I call the anchor.

Q   My question was more to the change in market value. Have you analyzed the change in the market value of PTV programming as it existed in 1992

1 versus as it exists in 1998?

2   A   If you mean by that, you know, do I have

3 figures showing how much cable operators are willing

4 to pay today for Public Television, as opposed to what

5 they were willing to pay in 1992, the answer is no, I

6 do not have those figures, nor do I have figures for

7 other program categories.

8   Q   In the context of this analysis, we do

9 have some behavior that is cited here. We can figure

10 out how many cable operators carry PTV distantly today

11 versus how many carried it in 1992?

12   A   Yes.

13   Q   And what they pay to carry PTV pursuant to

14 their compulsory license?

15   A   Right.

16   Q   And whether there is an increase in the

17 amount of carriage, correct?

18   A   Right. Yes.

19   MR. TUCCI: I think that is all.

20   JUDGE von KANN: Okay, Mr. Tucci. Does it

21 make sense to break for lunch now, break early, or do

22 you want to proceed, Mr. Garrett, a bit and then take

1 a lunch break or, to put it another way, what do you

2 estimate to be the length of your cross? And let's

3 figure out what makes sense.

4   MR. GARRETT: It will be a couple of hours

5 of cross.

6   JUDGE von KANN: And then I guess do I

7 presume that neither Music nor Canadians have lengthy

8 crosses in mind?

9   MS. WITSCHEL: You are correct, not

10 lengthy.

11   JUDGE von KANN: Okay. Mr. Satterfield?

12   MR. SATTERFIELD: It probably wouldn't be.

13 I've got to go back through it.

14   JUDGE von KANN: Okay. Well, why don't we

15 take the luncheon break now? Does that work all right

16 for everybody? Let's resume at 1:20.

17   (Whereupon, at 12:19 p.m., the foregoing

18   matter was recessed for lunch, to

19   reconvene at 1:24 p.m. the same day.)

20   JUDGE VON KANN: Okay. Mr. Garrett?

21   BY MR. GARRETT:

22   Q   Good afternoon, Dr. Johnson.   I'm Bob

1   Garrett. I represent the Joint Sports Claimants. Let

2   me ask you a little bit about your theory here on

3   subscriber instances.

4   A   Okay.

5   Q   You talk about how it's important to be

6   able to anchor that theory in a particular cost

7   decision, correct?

8   A   Yes.

9   Q   And you have chosen the '90 to '92 CARP

10   decision as your anchor.

11   A   Yes.

12   Q   And you feel that's a good, solid anchor.

13   A   Yes.

14   Q   Okay. And in that particular decision,

15   the Arbitrators increased the PTV award from four

16   percent to 5.5 percent, correct?

17   A   Yes.

18   Q   Okay. There were actually several

19   Masterpiece Theater viewers on that Panel, if you're

20   interested in knowing.

21   (Laughter.)

22   What I'd like to do is just kind of go

back a little bit in time and assume that we're in the

'90 to '92 proceeding as opposed to this proceeding.

And tell me, how would your theory have worked in that

case? What kind of an award would it have produced

for the Public Television Claimants in '90 to '92?

Have you done that for --

A   No, but I visualized what the alternative

would have been, which is namely the one that we're

talking about now. The use of subscriber instances of

carriage as a tool would have been as appropriate as

now. Now, the numbers would -- the world would be

different. We would have WTBS as a dominant distant

signal provider, but the principles would be the same

and the CARP would come out, based on my logic, with

something like 5.9 percent.

Now, there would be concern, well, but,

you know, all instances are not the same. You know,

this is just a volume measure. It's just a time

measure. You can't just base the award on that. And

so the Panel might have said, well, so let's look at

relative valuation. Let's move away from volume and

time. Let's get into the crunch issue, which is, you

1   know, what are relative program values, and they

2   might, then, have looked at alternatives, including

3   the Bortz survey at that time.

4   And they would have concluded, based on

5   all of the evidence, viewing shares and the Bortz

6   survey, and in this case the hypothetical subscriber

7   instances, five looks like a good level.

8   Q   Okay. What I'd like to do is --

9   A   All right.

10   Q   I'm sorry. Are you done?

11   A   Well, and I would just say that this

12   implies, then, a discount applied against public

13   television, the 9.2 -- the 92.4 percent discount, and

14   then that would reconcile the two measures.

15   Q   Okay. What I'd like to do is be a little

16   more precise and actually calculate, under your

17   theory, what the award would have been in '90 to '92.

18   Just using your theory, assume that that's what

19   they're focusing on, just as you asked this Panel to

20   focus on --

21   A   Right.

22   Q   -- what would Arbitrators have concluded

1   PTV's appropriate share should have been for '90 to

2   '92?

3   A   I can't answer the question beyond what

4   I've said. You are making a point that I'm missing.

5   Q   Okay. Well, what information do you need

6   from me to help you make the calculation back in '90

7   to '92?

8   A   What information do I need from you with

9   respect to -- I'm still unclear.

10   Q   You have a formula that you use here in

11   order to come up with public television's share,

12   correct?

13   A   Right.

14   Q   And that formula has several elements to

15   it, correct?

16   A   Right.

17   Q   You look, for example, at the public

18   television's share of basic subscriber instances, and

19   particularly yours, correct?

20   A   Right.

21   Q   And you also have this -- the discount,

22   the valuation number of about 90-odd percent, correct?

1   A   Yes.

2   Q   Now, if I gave you the same set of numbers

3   but for years '90 to '92, could you calculate for us

4   what public television's share of the royalty funds

5   should have been in that year?

6   A   Yes.   Concentrating on '92, the most

7   recent of those years, the data would be the ones that

8   we have, the CDC data going back to 1992.   I would

9   have calculated the share at 5.9, and then we would go

10 on then to modify that share.

11   Q   Assume the following for me. Assume that

12 public television's share of 1989 basic subscriber

13 instances was 5.81 percent.   Okay?

14   A   All right.

15   Q   And that their share of 1992 subscriber

16 instances was 5.86 percent.

17   A   All right.

18   Q   Okay?

19   A   Yes.

20   Q   And assume further that their award in

21 1989 when their share was at 5.81 percent was four

22 percent. What should their award have been in the '90

1   to '92 proceeding?

2   A   You know, I -- I did not go back to that

3   proceeding. Specifically, I do recall that that award

4   was lower, was fairly low relative to awards in

5   preceding -- there may have been anomalies in that

6   proceeding. I don't know.

7   Q   Okay. Well, I want to put all of the --

8   whatever anomalies might have existed aside. I just

9   want to concentrate on your theory and try to find out

10   how your theory would have worked had it been applied

11   before the arbitration of the last proceeding.

12   And so we're clear, you don't represent in

13   any way here that this concept of subscriber instances

14   was actually put before the Arbitrators in the '90 to

15   '92 proceeding.

16   A   No.   Instances of carriage have been

17   brought up in past proceedings. But because it's a

18   volume measure, a time measure, and sort of the

19   assumption of parity, it tends then not to be at the

20   forefront of final regulatory decisions.

21   Q   So that's why you've moved to what you

22   refer to as a new theory --

1   A   Right.

2   Q   -- subscriber instances.

3   A   Well, and, you know, adjusting for

4   subscriber base, taking into account differences

5   between partial and full, and facing directly the

6   question of relative valuation, which you can't do by

7   simply just looking at the numbers. If we could, then

8   we could have -- we would have gone with a higher

9   recommended award, in excess of the --

10   Q   And you make no claim, Dr. Johnson, that

11   there was even any evidence in the record of the '90

12   to '92 proceeding as to what basic instances were for

13   any particular category, do you?

14   A   No, I don't recall, but the data were

15   available.

16   Q   All right. So let's assume that variable

17   data was actually used in the '90 to '92 proceeding.

18   Can you calculate for me what public television's

19   share should have been under your theory?

20   A   Again, if the CARP had assumed parity, it

21   would have been 5.9. The CARP said, "We must consider

22   a range of evidence," correctly so. And there was a

1 voluminous record, and many arguments and counter

2 arguments. The CARP undoubtedly had, you know, a hard

3 time, you know, getting through, trying to resolve

4 conflicts, make sense of conflicts in the arguments,

5 and said then that the public television award will be

6 5.5.

7 JUDGE GULIN: Dr. Johnson, if you were

8 doing the same exact analysis in '90 to '92 that

9 you're doing today, wouldn't you have had to go back

10 and look at the prior proceedings? I think that's --

11 THE WITNESS: Oh, I see.

12 JUDGE GULIN: I think that's what --

13 THE WITNESS: I see your point.

14 JUDGE VON KANN: Yes, you're going from

15 '89 to the '90/'92 --

16 JUDGE GULIN: Right. So one could then

17 see, if your analysis is consistent going from the

18 prior proceeding to '90 to '92, as it is from '92 to

19 '98.

20 THE WITNESS: Well, now I understand the

21 point. I'm going back to the '92 proceeding, and I

22 would then leave it to the CARP about a decision based

1   on what I have presented, plus all of the other

2   information. And the decision they came to implicitly

3   shows public television at some discount, not exactly

4   at parity.

5   And that's the point that I'm making, that

6   the assumption of parity is not all that unreasonable,

7   given my example of, you know, how do you compute an

8   average, computing from 999 as compared to the one?

9   But I want to explore that, and I have done that by

10   looking at the CARP award and also looking at the

11   distribution of signals to see that -- that that first

12   public signal can be very highly valued, and because

13   it's weighted very highly that can substantially

14   affect that.

15   The average between the two values -- the

16   public television value and the commercial television

17   value -- and showing that the average is rough, can be

18   easily roughly equal to one.

19   BY MR. GARRETT:

20   Q   Let me try it this way, Dr. Johnson. You

21   would -- if we wanted to do this analysis back in the

22   '90 to '92 proceeding, we would need an anchor,

1   correct?

2   A   Yes, although I might not -- I might have

3   used a different procedure, but I might have tried a

4   different anchor in those days. It's hard for me to

5   put myself back in the 1992 proceeding and then say,

6   what would I have done with respect to past

7   proceedings?

8   Q   Okay.

9   A   I just have to --

10   Q   Okay.

11   A   I can't go beyond that at this point.

12   Q   Well, just assume with me for the moment

13   that the anchor you chose would be the CRT's awards in

14   the 1989 decision.

15   A   Right.

16   Q   The year immediately preceding that, okay?

17   A   Yes.

18   Q   So what we have here is 1989 CRT PTV

19   award, and that was four percent of the basic award.

20   A   Right, right.

21   Q   Okay? And assume further -- or now what

22   we're trying to figure out -- this is for 1989. Now

1   we want to figure out, what should the award be for

2   1990 to '92, all right?

3   A   Based on -- yes.

4   Q   Okay. So we go back and we use the four

5   percent as our anchor, all right?

6   A   All right. I follow you.

7   Q   Okay. And now what I'm going to tell you

8   is PBS's share of basic subscriber instances in 1981

9   -- I'm sorry, in 1989 was 5.81 percent.

10   A   All right.

11   Q   Okay? So we'll just put that --

12   A   All right.

13   Q   -- the PTV share of sub instances. Okay?

14   5.81 percent.   In 1989, PTV's share of basic

15   subscriber instances was 5.81 percent.   Would you

16   assume that's correct?

17   A   Fine.

18   Q   Okay. Now I'm going to tell you that, at

19   least in 1992, the second accounting period, that

20   number had gone up to 5.86 percent, okay? Got that?

21   A   Yes. Yes.

22   Q   All right.   So that's a rise of about

five-hundredths of a percentage point during those periods, correct?

A   Yes.

Q   Okay. So under your theory, what should the award have been to PTV for '90 to '92?

A   Percent -- again, if -- I'm assuming that the four percent award was based on a well-reasoned decision. I didn't go through that proceeding. I don't know what elements were taken into account in arriving at the four percent. I don't know why that four percent was actually lower than awards that have been made, as I recall, in previous decisions. There could be anomalies. I do not know.

Now, I might have said here I am, in the earlier proceeding, and now I want to find an anchor. And ah ha, I'll take the preceding award, and I'll see what those figures show, and I'll say, "Oh, but that -- you know, that award was just fatally flawed." And I'd say -- but you'd have to do something else.

This is not a good, sound procedure, a robust procedure, to estimate relative valuations over such a long period of time. I'm attracted to the

1   decision underlying the 5.5 percent award, because I

2   simply went through the proceeding in some detail, and

3   it seemed well reasoned to me. The basis -- I thought

4   it was conservative, but it was, you know, okay.

5   Q   All right. Did you review the 1989 CRT

6   decision?

7   A   No.

8   Q   Okay. Well, again, for purposes of our

9   discussion here, just assume with me that it was a

10 very well-reasoned opinion with respect to public

11 television.

12   A   All right.

13   Q   And that it resulted in a 4.0 percent

14 award.

15   A   All right.

16   Q   Okay? And that we've decided that we are

17 going to use that as the anchor for '90 to '92.

18   A   All right.

19   Q   All right. Can you just tell me, under

20 your theory --

21   A   Right.

22   Q   -- what would the award have been or

1   should have been --

2   A   Well --

3   Q   -- for CRT?

4   A   Well, let's -- you say the PTV share is

5   5.81.

6   Q   Yes.

7   A   The actual award was four percent. That

8   implies a discount of, oh, roughly --

9   Q   68 percent?

10   A   Yes. Well, no, that -- yes, the discount

11   factor would be .68 instead of .92.

12   Q   Okay.   That's true.   So having that

13   additional fact, would that help you then to now

14   calculate the -- what the '90 to '92 award should have

15   been?

16   JUDGE VON KANN: Dr. Johnson, if you wish

17   to have a calculator, we can certainly provide one.

18   You don't have to do this in your head.

19   THE WITNESS: Yes.   But that's -- the

20   point is important to -- there would be a substantial

21   increase in the discounted value. Assuming this to be

22   reasonable, and had I gone through that award process

1   and found the decision-making to have been well

2   reasoned, I might then conclude differently.

3   BY MR. GARRETT:

4   Q   Doctor, so as not to spend too long on

5   this, would it be fair to say that under your theory

6   the 1990 to '92 public television award would have

7   been somewhere in the neighborhood of about 4.1

8   percent?

9   A   Applying the larger discount factor, yes.

10   Q   And, in fact, the award was 5.5 percent,

11   right?

12   A   Yes.

13   Q   You expressed some discomfort here about

14   using 1989 -- the 1989 decision, correct?

15   A   Yes, because I have not reviewed that

16   decision.

17   Q   All right. What if we try to do the same

18   analysis using as our anchor the very first award for

19   public television in these proceedings, the one in

20   1978.

21   A   I would have qualms, because so much has

22   happened in the industry that I would need to take a

1   lot more into account and make many more assessments

2   in determining the relevance of such earlier

3   deliberations to the matters at hand.

4   The advantage of looking at 1990-'92 is

5   that that is not all that long ago. We have seen

6   major shifts in the industry that are fairly

7   understandable, and the kinds of data sources used are

8   ones that perhaps would have been used in many of the

9   earlier proceedings, but perhaps in different ways,

10   you know, viewing data, the Bortz survey.

11   And I simply cannot respond well to that

12   question. Those proceedings, again, took place under

13   such a different environment. Again, cable networks

14   were a small part of the total picture. Distant

15   signals were very important in the -- in determining

16   and assessing the future of cable television. So I

17   just can't respond.

18   Q   Let me -- did that complete your answer,

19   Doctor?

20   A   Yes.

21   Q   Thank you. Let me, at this time,

22   distribute what we'll have marked as JSC Exhibit

1   Number 29-X.

2   (Whereupon, the above-referred

3   to document was marked as JSC

4   Exhibit   No.   29-X   for

5   identification.)

6   Dr. Johnson, I have distributed to you and

7   to the Panel a document which we have marked as JSC

8   Exhibit 29-X.

9   A   Yes.

10   Q   Do you have that before you?

11   A   Yes.

12   Q   Okay.   It's entitled PBS Percentage of

13   Subscriber Instances of Distant Signal Carriage Within

14   Basic Fund, 1978 to 1999. Do you see that?

15   A   Yes.

16   Q   Okay.   And I will represent to you that

17   this chart is based upon data that we have obtained

18   from Cable Data Corporation.

19   A   Yes.

20   Q   You're   familiar   with   Cable   Data

21   Corporation.

22   A   Oh, yes.

1 Q Okay. Now, what we have tried to do in

2 this chart here is to show for each of the years, or

3 at least for each of the accounting periods identified

4 down at the bottom, the percentage of subscriber

5 instances of -- or PTV's percentage of subscriber

6 instances of distant signal carriage. Okay?

7 A Yes.

8 Q As you can see, we only have data for the

9 particular years that are identified there. But in

10 1978, second accounting period, PTV's share of basic

11 subscriber instances was 10.68 percent. Do you see

12 that?

13 A Yes.

14 Q Were you aware of that?

15 A Aware of that pattern?

16 Q Were you aware of that in 1978, that PTV

17 had a share of basic subscriber instances of around

18 10.68 percent?

19 A Looking at some other data, it was

20 roughly. I'm aware of -- of relatively high

21 percentages in the early years, yes, and I'm looking

22 at some other data here, trying to compare. I can see

1   the basis for your data.

2   Q   Okay. So you have some other data there

3   available to you --

4   A   Right.

5   Q   -- that can help confirm the numbers here?

6   A   Roughly. Roughly.

7   Q   Okay.

8   A   That there was -- there was trough, and

9   the pattern is roughly as you have represented.

10   Q   All right. And are you aware of what the

11   first award was to the public television claimants in

12   the '78 proceeding?

13   A   Was it 5.25 percent?

14   Q   Would it have been closer to five percent?

15   A   Well, something in that -- something of

16   that -- in the five percent arena.

17   Q   All right. So assume that it was about

18   five percent. That would have suggested what kind of

19   a discount factor was applied to the subscriber

20   instances in that --

21   A   You know, they had already spent like 50

22   percent.

Q   Okay.

A   As I recall, the award was somewhat above five percent. But the point that's important, that the discount factor would have been larger.

Q   Were you aware of what the public television claimants' share of fees generated was in that year?

A   I do not have those figures.

Q   Okay. Would it surprise you that the number would have been around five, five and a half percent?

A   The fee schedule was different in those days, was it not?

Q   Yes.

A   And that's one of the many factors that would have to be taken into account. So I accept that it -- you know, the fees generated were in the neighborhood of five percent.

Q   All right. If we used as our anchor here the 1978 decision -- and I understand your misgivings about it, but assume that we used it as an anchor for 1998.   Under your theory, what would the public

1   television claimants' award be?

2   A   Computing it in my head, you know, clearly

3   it would have been -- the discount factor would have

4   been large -- larger than my 92.4 percent. You know,

5   I see the point you're making about this series.

6   Q   Well, is it fair to say that as we go back

7   and look at the history of these proceedings that this

8   discount factor, as you refer to it, seems to have

9   varied over the period of time?

10   A   Enormously so, because the underlying

11 circumstances varied so greatly. The reason for this

12 pattern emerges largely because the SYNDEX portion of

13 the pool, as well as secondarily the 3.75 Fund, were

14 much, much larger. More than half of the total pool

15 was attributable to SYNDEX primarily and to -- lesser

16 to 3.75.

17   In the recent years, SYNDEX is now very

18 small. It almost -- it gets lost in the roundings

19 when I do my calculations. And as we know, the

20 relative size of the SYNDEX -- of the 3.75 Fund has

21 fallen since 1992 from something over 20 percent to

22 more like nine or 10 percent today. And in the 1980s

1   that fund was more than half.

2   Now, when I go back, hypothetically, to

3   these earlier proceedings, I would have to take into

4   account the fact that here is a consideration which

5   looms, you know, sort of like the 800-pound gorilla,

6   but today is very different in relative size, and we

7   see now how that size has changed from 1992.

8   But, you know, had I gone back to these

9   earlier proceedings and taken fully into account the

10   data you present, I would have said, "Look, this

11   procedure cannot be used as I developed it, with

12   particular respect to the 1990-'92 proceeding."

13   I would have to say, well, clearly, we

14   have to take into account SYNDEX in a way that I

15   didn't. It gets lost in the rounding. And I have to

16   say, well, we need to take now a share of the total

17   pool, and we find that it's now -- that these numbers

18   now are much more stable.

19   PTV, as a share of the total pool, sort of

20   runs around five, six, started at something over eight

21   percent before SYNDEX emerged as a factor back in

22   1992. And so I would have had to have adjusted my

1   whole train of thinking to take into account a

2   radically different environment.

3   MR. GARRETT: Can I have that answer read

4   back?

5   JUDGE VON KANN: No.

6   (Laughter.)

7   BY MR. GARRETT:

8   Q   Dr. Johnson, do you know whether there was

9   a SYNDEX Fund in 1978?

10   A   According to my figures, the fund emerged

11   in the first semester of 1983.

12   Q   Well, do you know whether there was a 3.75

13   Fund in --

14   A   It does not show up in my figures.

15   Q   I was going to say in 1978.

16   A   I don't have the '78, but I have zeroes

17   for the years up to the first semester of 1983.

18   Q   All we tried to show on this particular

19   exhibit here, 29-X, is the share of -- PTV share of

20   basic fund instances of carriage.

21   A   Right.

22   Q   You understand that.

1   A   Yes.

2   Q   Okay. And if we -- and we are going to

3 use 1978 as an anchor to set the award for 1998, okay?

4 Would it be fair to conclude that public television's

5 award for 1998 would be very close to what it was in

6 1978?

7   A   I cannot answer that question. To talk

8 about 1978 as the basis for setting the award in

9 subsequent periods, and then using that to set the

10 award today, is sort of -- you know, the tail wagging

11 the dog is 1978. Everything starts with 1978, and I

12 cannot put myself into that -- that kind of chain

13 reaction.

14   Q   Do you see a value in trying to keep the

15 distribution theories consistent over the years, or at

16 least being able to reasonably articulate any

17 departure from those theories?

18   A   Yes. I suppose, you know, one could have

19 gone through all of the proceedings. One could have

20 used the kinds of data that you present. One would

21 have adjusted the methodology for taking into account

22 this enormous SYNDEX Fund. And then, one would have

1   developed the award based on all of that for 1990-'92,

2   and then that would have been the anchor for the

3   deliberations today.

4   Where would it have come out? I don't

5   know.

6   MR. GARRETT: Mr. Chairman, I would move

7   29-X as substantive evidence.

8   JUDGE VON KANN: Mr. Dove?

9   MR. DOVE: No objection, subject to check.

10   JUDGE VON KANN: All right.

11   (Whereupon, the above-referred

12   to document, previously marked

13   as JSC Exhibit No. 29-X for

14   identification, was received in

15   evidence.)

16   Let me ask Dr. Johnson one question about

17   this chart before we move on. Dr. Johnson, when Mr.

18   Garrett showed you this chart, I think you said you

19   sort of recognize this -- what I think you described

20   as a trough, this quite marked dip and then rise.

21   THE WITNESS: Yes.

22   JUDGE VON KANN: And that that was

1   consistent with some other information you have. Can

2   you tell a novice to the field like me in a fairly --

3   in as succinct a fashion as possible, what is the

4   principal explanation for this trough, in your view?

5   THE WITNESS: Yes. The reason for the

6   very high figures, or I should -- in 1992, when SYNDEX

7   was roughly half of the total, we had, according to my

8   figure, PTV as a share of basic was even higher than

9   this. It was like 12 percent.

10   And the reason for that was that the basic

11   pool was relatively small, because the SYNDEX pool was

12   so large. And that continued for a number of years,

13   and --

14   MR. DOVE: Excuse me. Just to correct the

15   record, did you say 1992 or 1982?

16   THE WITNESS: 1982, I believe. I have

17   figures showing PTV's share of basic at -- for the

18   first semester 1983 of 12.8 percent.

19   MR. GARRETT: I guess it would help, then,

20   if we could get a copy of what it is that Dr. Johnson

21   is looking at, so that we can determine what it is

22   that he's referring to.

1   THE WITNESS: But in response to your

2   question, why the change, the change occurred because

3   the basic fund very substantially contracted when the

4   SYNDEX Fund was instituted.   And that very much

5   affected public television as a share of basic, and

6   then it was in 1990, in the first semester, that a

7   change was made such that SYNDEX drastically fell in

8   value from something like 63 million down to less than

9   one million.   And so suddenly the basic fund

10   increased, and that affected the public television

11   share.

12   JUDGE YOUNG: Well, maybe I'm not

13   following this, but I thought --

14   THE WITNESS: Yes.

15   JUDGE YOUNG: -- that the point of this

16   Exhibit 29-X is to show the percentage of PBS, the

17   subscriber instances of the basic fund.

18   THE WITNESS: Yes, that is exactly --

19   JUDGE YOUNG: But if the basic fund is

20   decreasing, PBS's share, even if it stays the same,

21   wouldn't the percentage go up?

22   THE WITNESS: Right. Yes.

1   JUDGE YOUNG: But I thought you said for

2   the period of the 1980s, that's the explanation for

3   why it went down.

4   THE WITNESS: Well, in 19 -- there is some

5   mismatch in these data. I'm not certain about the

6   source, but I recognize the substance of what you're

7   saying.

8   There was a large change in the size of

9   the basic fund, not because there was suddenly lots

10   more cable carriage but simply because of the reality

11   -- the allocation of monies from what would have

12   otherwise gone into the basic fund into SYNDEX. And

13   the SYNDEX numbers that I have exceed the basic fund

14   numbers more than half.

15   Now, had I been involved in examining the

16   earlier proceedings, I would have recognized this, and

17   I would have said, "Well, we need to go to some -- we

18   need to measure the public television share as a

19   percentage of the total total," in which case it would

20   have been quite stable.

21   JUDGE VON KANN: Can we recap it in this

22   fashion? Is it your testimony that the trough

1   depicted here is caused principally by the impact of

2   the SYNDEX Fund?

3   THE WITNESS: Yes.

4   JUDGE VON KANN: Okay.

5   JUDGE GULIN: Dr. Johnson, perhaps I'm

6   somewhat confused, but I thought that this chart was

7   portraying percentage of PBS sub instances. We're not

8   talking about dollars into a particular fund here, are

9   we?

10   THE WITNESS: We're talking about the

11   share of public television subscriber instances --

12   JUDGE GULIN: Right.

13   THE WITNESS: -- to total subscriber

14   instance or to total instances, however we want to put

15   it, in the basic fund.

16   JUDGE GULIN: Right.

17   THE WITNESS: The basic fund dramatically

18   changes in size, because of the presence of SYNDEX.

19   The public television share is necessarily

20   substantially affected, not because more cable

21   operators are carrying public television at all. It's

22   because the base has changed.

1   And had I been involved in these earlier

2   proceedings, I would have recognized this, and I would

3   have altered my methodology. By 1992, this was not as

4   important, or we could see what was going on.   We

5   could recognize the role of the 3.75 Fund and how

6   money collected for those distant signals gets into

7   the compulsory license pool, but then how we have to

8   adjust in order to get the basic pool out of which,

9   then, I do my calculations.

10   JUDGE VON KANN: Okay. Mr. Garrett?

11   BY MR. GARRETT:

12   Q   Dr. Johnson, do you think that part of the

13   explanation for this trough here was the rise in the

14   carriage of superstations -- WTBS, WGN, and WWOR --

15   during this period?

16   A   It could have been, and that is an

17   excellent example of the kinds of market developments

18   that I would have had to have taken into account, and

19   did not take into account because I did not examine

20   that period.

21   MR. GARRETT: At this time, let me

22   distribute what we'll have marked as JSC Exhibit

1   Number 30-X.

2   (Whereupon, the above-referred

3   to document was marked as JSC

4   Exhibit No. 30-X for

5   identification.)

6   BY MR. GARRETT:

7   Q   Dr. Johnson, I have distributed to you and

8   to the Panel a document which has been marked as JSC

9   Exhibit Number 30-X.

10   A   Yes.

11   Q   It's entitled Comparison of WTBS, WWOR,

12   and WGN Percent of All Subscriber Instances of Distant

13   Signal Carriage with PTV Percentage, 1978 to 1999. Do

14   you see that?

15   A   Yes.

16   Q   Let me represent to you that, again, this

17   chart is based upon data that we received from Cable

18   Data Corporation. Let me also represent that, whereas

19   in 29-X we looked at the basic fund instances, here

20   we've looked at all instances of carriage, since we

21   did not have the WTBS, WWOR, and WGN basic subscriber

22   instances.

1   A   All right.

2   Q   So you will see some differences in the

3   line for public television. Do you see that?

4   A   Yes.

5   Q   So that, for example, in 1978, public

6   television's share of all subscriber instances was

7   10.68 percent. And you see that in both 29-X and

8   30-X, correct?

9   A   Yes.

10   Q   All right. And that's because there was

11 no 3.75 or SYNDEX Fund in that year, correct?

12   A   Right.

13   Q   But then we go to 1983, which was the

14 first year of the basic -- I'm sorry, of the 3.75 and

15 SYNDEX Funds, public television's share of all those

16 funds drops to 6.59 percent instead of the 7.14

17 percent that is reflected in JSC 29-X. Do you see

18 that?

19   A   Yes. And --

20   Q   I'm sorry. Is there -- okay. And then,

21 beginning in 1983-2 and continuing through 1999-2, you

22 will see some differences in the percentages.

1   A   Yes.

2   Q   Is it your understanding, Dr. Johnson,

3   that over this period of '78 through '88, that the

4   carriage   of   superstations   increased   rather

5   significantly?

6   A   Yes.

7   Q   Okay.   And because the carriage of

8   superstations increased rather significantly, that

9   helped to depress the share of -- public television's

10   share of total subscriber instances, correct?

11   A   Yes.

12   Q   Okay. Now, if we just focus for a moment

13   on 1978, public television's share of instances of

14   carriage and the superstation's share are very close,

15   are they not?

16   A   Yes.

17   Q   Public television is about 10.68 percent,

18   and all of the superstations are at 12.92 percent,

19   correct?

20   A   Yes.

21   Q   Okay. And that was the year in which the

22   Tribunal awarded five percent to the public television

1   claimants, correct?

2   A   Approximately five, yes.

3   Q   Okay. And we see going all the way over

4   to 1992 that public television's share, or the

5   disparity between these two shares, had increased

6   quite significantly during that period, correct?

7   A   Yes.

8   Q   Okay. But yet public television's award

9   had remained at relatively the same levels, in the

10   neighborhood of four to five and a half percent or so,

11   correct?

12   A   Yes.

13   Q   Would you think that under the theory that

14   you have advanced in this proceeding that those

15   decisions -- those cases were wrongly decided, that

16   public television's shares should actually have been

17   much lower than what it really was?

18   A   I cannot say that. This pattern is

19   perfectly understandable. We had the emergence of

20   satellite technology for nationwide interconnection,

21   and this had a very favorable effect on the

22   development of superstations. And so the percentage

1   rose rapidly.

2   By 1992, the industry had matured, and we

3   see now movement from -- from distant signals to the

4   cable network market.   And I'm not -- I'm not sure

5   what I could say with respect to the PBS award in this

6   timeframe.

7   I could only say that this is one of the

8   many factors I would have had to consider had I gone

9   back to 1978 and then proceeded to revisit all of the

10   proceedings, taking into account this, the growth in

11   superstations, taking into account the trough in the

12   PTV share, and taking into account lots of other

13   things.

14   Q   Okay. Well, I guess it's fair to say that

15   in 1998 and 1999, public television's share of

16   subscriber instances is much closer to the

17   superstation share than it has been in a long time,

18   correct?

19   A   Yes.

20   Q   Okay.   And that, in fact, is what

21   motivates your testimony here about the change in

22   public television's share in this proceeding.

1   A   Yes.

2   Q   But, in fact, over a period of time we've

3   often had the superstation shares and the public

4   television station shares even closer than what it is

5   here in 1998 and 1999, correct?

6   A   Yes.

7   Q   Okay. And throughout this whole period,

8   it seems that notwithstanding the increasing disparity

9   between public television's share and superstation

10 share that public television has been receiving pretty

11 much the same percentage award, right?

12   A   Yes. I see the point you are making, yes.

13   Q   Well --

14   A   I understand this.

15   Q   Do you think that what they're doing here

16 is fair, given the history of these proceedings?

17   A   I see what your -- if I may reinterpret

18 your question, you're saying that since -- since this

19 share has dropped, and I argue for an increase in the

20 public television share because of the shift in

21 programming from the royalty pool to the cable network

22 pool, should I not also have argued back in 1980 when

1   this was going way up that the public television share

2   should be dropping because we're having this increase

3   in the share of superstations?

4   And all I can say is I have to take this

5   into account with all of the other information that

6   would have been part of the record in those earlier

7   proceedings.   And that's -- so this is a very

8   interesting pattern. I can understand how the numbers

9   were computed and why this happened.

10   But the basic conclusion remains that

11   within the relevant timeframe -- 1992 to 1998-'99 --

12   there has been a very substantial change in the

13   structure of the industry. And it is that change that

14   brings us together in this proceeding, and that as a

15   consequence of my analysis of that change I come out

16   with the figures that I have previously described.

17   Q   Let me read you just a bit here from the

18   proposed findings of the public television claimants

19   for the year 1983, and then ask whether you agree with

20   a particular argument.   I'll show it to you so that

21   you can --

22   A   All right.

1   Q   -- but let me read it first. It says,

2   beginning at page 40, paragraph 65, "The evidence of

3   decisional acts taking place in distant cable

4   communities throughout the United States during the

5   year 1983 is striking. During that year, cable

6   television systems throughout the nation devoted

7   approximately eight percent of their distant inventory

8   to the carriage of public television stations."

9   And then it goes on a couple of sentences.

10   It says, "The 1983 percentage, approximately eight

11   percent, reflects a slight drop when the percentage of

12   the distant cable inventory, approximately nine to 10

13   percent, occupied by public television signals three

14   years ago in 1980.

15   "During the three-year period from '80 to

16   '83, there was extensive activity and growth in the

17   number of distant signals attributable to superstation

18   WTBS, which has aggressively sought out distant

19   carriage, sells national advertising on the basis of

20   that carriage, and claims to have already compensated

21   its program sources for nationwide distribution of

22   their programs." And then there are some citations

1   that follow.

2   "While the whole facts and implications

3   from those facts are not known or reflected in the

4   record, it is clear that WTBS functions much like a

5   cable network service in contrast to other commercial

6   signals.   If WTBS signals are excluded from

7   consideration, the public television share of the

8   distant cable inventory has remained constant in

9   approximately the nine to 10 percent range."

10   Do you understand that argument that was

11   made?

12   MR. DOVE: I want to just object. I mean,

13   the witness has already stated several times that he

14   -- you know, he is looking at the data from 1992 to

15   the present, and that he hasn't reviewed the

16   proceedings from 1983 or 1989 in connection with this

17   matter, and that asking the witness, you know,

18   questions from something in 1983 out of context, out

19   of -- you know, without him having a chance to review

20   it, it's not appropriate.

21   JUDGE VON KANN: Overruled. But if the

22   witness wants to look at the testimony, he certainly

1   may.

2   BY MR. GARRETT:

3   Q   Would you like to look more closely at the

4   findings that I just read?

5   A   I could look at the findings quickly, but

6   I can only respond that, you know, had I been in the

7   role I am now, I might have, taking into account those

8   different factors, have come to different conclusions.

9   I understand the words. Do I agree with them? I

10 can't say.

11   Q   Assume that in 1983 that the argument of

12 the public television claimants was that -- don't look

13 at WTBS, look at the rest of the universe, because

14 that's the most relevant here. And if you look at the

15 rest of the universe, our share of instances of

16 carriage -- I'm talking about instances of carriage --

17   A   All right.

18   Q   -- has stayed relatively the same.

19   A   All right.

20   Q   Would that have been, at that point in

21 time, a reasonable argument to make under your theory?

22   A   I do not know. I would have to ask what

else was going on. What is the contrary argument? I understand the logic. If you say, does that logic seem reasonable? Well, yes. You know, A follows from B, and B from C. But I have no idea at this point how relevant what you have said is to what we are doing now.

Q   Following on that, would you agree that it's not enough for the Panel to simply look at your theory here about changes in subscriber instances, but they need to look at all of the facts and circumstances surrounding this period here to determine what the appropriate royalty award should be?

A   Yes, certainly.

Q   So you're not giving them, with your basic subscriber instances theory here, a formula for allocation, but it's simply one factor that they should be taking into account.

A   What I am presenting here is a method for setting the PBS award. This methodology cannot be used to set the awards for other program claimants. The Panel will certainly have to take into account a

1   wide variety of data sources, other information, in

2   setting the other awards.

3   Q   In setting the public television --

4   A   In setting the other awards, I'm saying

5   that this -- my analysis provides a good basis for

6   setting the public television award.

7   And where one would, of course, want to

8   take into account corroborating evidence, you know,

9   look at viewing shares, how does public television

10   look in viewing shares, how does it look in

11   econometric analysis, how has that changed, and then

12   taking into account those data, make judgments about

13   other claimants' shares.

14   The point I would make is that in

15   adjusting upward the public television award, a

16   primary source of that increase would come from the

17   group of program suppliers that have shifted from the

18   compulsory license -- or shifted in part from the

19   compulsory license pool to the cable network pool.

20   Q   And so --

21   A   And massive shift, I might add.

22   Q   So you're asking -- you're suggesting a

1   doubling of the public television award, correct?

2   A   Based on my methodology, that level seems

3   quite reasonable.

4   Q   All right.   And the additional points,

5   then, need to come from other claimants, correct?

6   A   Yes.

7   Q   Okay.   And those would be the claimants

8   who had programming on TBS, correct?

9   A   That would be the first place to look at.

10 Now, again, you would have to look at all of the

11 evidence about where the cuts would take place.   But

12 that would certainly be a prime candidate, then, for

13 looking at adjustments.

14   Q   So assume that the commercial television

15 claimants had programming on TBS.   Under your theory,

16 one should look at their award as well and reduce it

17 to account for TBS.

18   A   Well, yes, or to the extent that some

19 programmers don't have much of a transfer, then they

20 would perhaps be neutral or perhaps also would see an

21 increase in their awards.

22   Let's put it different.   If a programmer

faces, say, just a 10 percent shift from the pool to the cable network, then it may turn out that that program source would have some increase in the award as well. In the PBS case it's easy, because there's a zero transfer.

Now, what happens if there is just a 10 percent transfer or a five percent transfer? There might still be an increase in the net award. After all, if I'm asking for a doubling in the public television award, then there might also be some increases in the other awards.

Where the big adjustment comes is where there is a major, major transfer in certain program categories to the cable network market.

Q Mr. Stewart asked that I ask you whether you should also look to the devotional claimants.

(Laughter.)

JUDGE VON KANN: Would this be a good place to take a break? Let's take 15 minutes, and then we'll resume.

(Whereupon, the proceedings in the foregoing matter went off the record at

1   2:23 p.m. and went back on the record at

2   2:46 p.m.)

3   JUDGE von KANN: Let's see if we can say

4   it on the record.   There's been some discussion

5   between counsel for Sports Claimants and Public

6   Television, and I believe it's been agreed to add to

7   the record tomorrow an exhibit, which will be JSC

8   Exhibit 31-X, and that will be the document that Dr.

9   Johnson was referring to during some of his last

10   testimony that he said he has some figures, but you're

11   going to redact the handwritten notations on the

12   document. Is that the agreement?

13   MR. GARRETT: With a brief explanation of

14   what the data represents tomorrow.

15   JUDGE von KANN: Okay. Do you want to get

16   that from Dr. Johnson now or do you want to get it

17   from Mr. Dove tomorrow? I guess it doesn't matter.

18   I assume Dr. Johnson may not be here tomorrow.

19   MR. GARRETT: No.

20   JUDGE von KANN: If there's any questions

21   for him about it --

22   MR. GARRETT: Does he know exactly what

1   all the data is in there?

2   MR. DOVE: This is a document that we gave

3   Dr. Johnson on May 12.

4   JUDGE von KANN: Why don't we do this:

5   How about letting Mr. Dove right now indicate, if

6   you're comfortable with it, since they provided the

7   document, what it reflects, and then if you have any

8   follow-up questions for Dr. Johnson about it, we can

9   do it while he's here.

10   MR. GARRETT: That's fine.

11   JUDGE von KANN: Okay. Mr. Dove, do you

12 want to tell us what we've got?

13   MR. DOVE: This is a document dated May

14 12, 2003, titled, "Cable Data Corporation," and it

15 lists several -- or a number of columns of

16 information, the year, from 1979 up to 2002. The

17 column that is labeled SS Subs Dist, D-I-S-T, hyphen

18 T-O-T subtotal, then SS-subs 375 subtotal. The next

19 column is SS-Subs Syndex; the next column is

20 Basic/Sub/Inst subtotal; the next column is

21 PTV_sub_inst subtotal; and the last column is PTV as

22 percentage of Basic. This was provided to the Witness

1   actually on May 13, 2003.

2   The data reflects data that we obtained

3   from Cable Data Corporation with the -- it was in the

4   process of preparing the Witness to testify. And I

5   can say that from -- there is some uncertainty in

6   these numbers, as expressed to me by Joan Martin for

7   Cable Data Corporation where she provided this

8   printout to try to give a time series of certain data

9   that we had requested in connection with the case.

10   JUDGE von KANN: All right. Does that do

11   for the moment, Mr. Garrett?

12   MR. GARRETT: I guess I would only ask how

13   that last column, PTV as percent of Basic, is

14   calculated and what it represents.

15   MR. DOVE: Well, I could tell you how I

16   believe it was calculated. I guess what it represents

17   is a broader question. But I believe it is what it

18   says it is. It's the percentage of the PTV subscriber

19   instances divided the Basic subscriber instances as

20   these are calculated here. And, again, there is some

21   -- Ms. Martin of Cable Data Corporation indicated some

22   concern as to whether these figures were in fact

accurate but nevertheless provided these to us at my
request.

MR. GARRETT: Okay. That's fine for me.

JUDGE von KANN: All right. Let's
proceed. And we'll get the document and put it in the
record tomorrow, the cleaned up version.

MR. GARRETT: Mr. Chairman, I over the
break distributed a document that has previously has
been marked and received into evidence as Program
Suppliers Exhibit 18-X. It is the screen shot that
shows data from the Rosston database. Dr. Johnson --

JUDGE von KANN: Let me just ask a
question, because I don't think we got a -- are you
done with 30-X?

MR. GARRETT: Yes.

JUDGE von KANN: Do you move it in some
fashion?

MR. GARRETT: I will move it for
impeachment purposes?

JUDGE von KANN: Okay. Mr. Dove?

MR. DOVE: No objection as to impeachment
purposes.

1   JUDGE von KANN: All right. So received.

2   (Whereupon, the above-referred

3   to document, previously marked

4   as JSC Exhibit No. 30-X for

5   identification, was admitted

6   into evidence.)

7   JUDGE von KANN: Okay. Go ahead.

8   BY MR. GARRETT:

9   Q   Dr. Johnson, do you have Program Supplier

10   PS Exhibit 18-X there in front of you?

11   A   Yes, I do.

12   Q   Okay. Dr. Johnson, I just want to make

13   certain I understand how your subscriber instance is

14   used in practice here.

15   A   All right.

16   Q   If you take a look at 18-X, this

17   identifies a number of cable systems that Dr. Rosston

18   had studied. Are you familiar with Dr. Rosston?

19   A   Yes. I followed his submission in the

20   transcript, actually.

21   Q   All right. And you know he collected data

22   from Cable Data Corporation on various cable systems?

1   A   No, but that's seems reasonable that he

2 would have.

3   Q   In this document here if you go to the

4 Column G, called subscribers, do you see that?

5   A   Column G, yes.

6   Q   And I'll represent to you that, as I

7 understand it, this column shows the number of

8 subscribers to the particular cable systems that are

9 identified on this document. Do you understand that?

10   A   Yes.

11   Q   And in the next Column H, we see their

12 gross receipts; do you see that?

13   A   Are these basic subscriber receipts?

14   Q   Yes. My understanding is that these are

15 the receipts that are then subject to calculation of

16 royalty fee.

17   A   Okay. All right.

18   Q   And then in the next Column I, we see the

19 royalties that were actually paid during that

20 particular accounting period?

21   A   Right.

22   Q   Do you see that?

1   A   Yes.

2   Q   All right. Now, as I understand -- let me

3 just go down to Line 1499 as an example here. You see

4 Louisville?

5   A   Fourteen ninety-nine, first semester, one,

6 Louisville.

7   Q   Right.

8   A   Yes.

9   Q   You see it has 2,245 subscribers.

10   A   Yes.

11   Q   And then right beneath that Fort Wayne has

12 6,568.

13   A   Yes.

14   Q   And we actually go over to Column -- well,

15 let's assume that both of those systems each carry one

16 signal. Let's just say it was WGN.

17   A   ` All right. Let me write that down. One

18 signal, WGN.

19   Q   As I understand your theory, WGN would be

20 credited with 2,245 subscriber instances plus 6,568

21 subscriber instances, correct?

22   A   If Louisville is bringing in a single

1   distant signal, that would represent 2,245 subscriber

2   instances; is that --

3   Q   Right.

4   A   Yes.

5   Q   Right. And just to make this clear, let's

6   assume Louisville is bringing in WGN and that Fort

7   Wayne is bringing in WXXX, okay?

8   A   All right.

9   Q   So if that was your entire universe here,

10 we would have 2,245 subscriber instances for WGN and

11 6,558 for WXXX, correct?

12   A   Yes.

13   Q   All right. And --

14   JUDGE von KANN: Mr. Garrett, can I just

15 ask a question now that you've focused on it.   It

16 might impact Dr. Johnson's answers but also my

17 understanding. Can this be right? We've got a cable

18 system in Houston, Texas that only has 4,000

19 subscribers. We've got big cities with very small

20 numbers of subscribers. Am I missing something? That

21 doesn't seem right.

22   MR. GARRETT: Actually, maybe it's my

1   imprecision. This is the ADI that the cable system is

2   located in as opposed to the cable system, at least

3   that's my understanding.

4   JUDGE von KANN: What does that mean?

5   There's only 4,000 possible in the Houston ADI --

6   MR. GARRETT: It's a cable system that is

7   located in the Houston ADI that only has a couple

8   thousand subscribers.

9   JUDGE von KANN: So it's a small cable

10 system in the Houston ADI.

11   MR. GARRETT: Yes.

12   JUDGE von KANN: But there's probably a

13 much larger cable system --

14   MR. GARRETT: Yes.

15   JUDGE von KANN: -- somewhere in the -- I

16 see.

17   MR. GARRETT: I mean it appears that this

18 was generated in rank order of gross receipts, so

19 you've got a number of the smaller cable systems here.

20   JUDGE von KANN: I see. Okay.

21   BY MR. GARRETT:

22   Q   Let's go back to the Louisville and Fort

1   Wayne examples. You see that Fort Wayne has two and

2   a half to almost three times as many subscribers,

3   right?

4   A   Yes.

5   Q   But they both pay exactly the same royalty

6   or just about the same royalty, within one dollar,

7   correct?

8   A   Yes. That strikes me as strange.

9   Q   Well, could it be explained by the fact

10   that the monthly subscriber fee might be very

11   different for one cable system than the other?

12   A   Yes.

13   Q   Okay. And that in fact during this period

14   there was some significant variation in the monthly

15   subscriber fees paid by cable subscribers, was there

16   not?

17   A   Certainly that is possible.

18   Q   And a lot of that was affected by rate

19   regulation, correct?

20   A   Yes.

21   Q   But the only point I wanted to make

22   certain we understood is that under the subscriber

1   instances approach that you've taken, it makes no

2   difference that the royalty of these two systems is

3   about the same, right?

4   A   Yes.

5   Q   One will be credited with almost three

6   times the number of subscriber instances as the other,

7   correct?

8   A   Yes.

9   Q   And you do not in any way take account in

10   your subscriber instances theory of the actual

11   royalties that are being paid for the distant signals

12   that are being carried, correct?

13   A   That is correct, because, as I have said

14   before, those fee payments are not a dependable

15   measure of marketplace forces, so I do not take that

16   into account.

17   Q   In this particular case, we just have two

18   individual systems where it's pretty clear on how much

19   was paid for the signals carried, right?

20   A   Would you please -- repeat the question,

21   please.

22   Q   In this particular example, we have two

1   systems where it's pretty clear exactly how much was

2   paid to carry the signals, correct?

3   A   Yes.

4   Q   And, again, under your subscriber

5   instances approach, you would weight one system about

6   three times more than the other even though their

7   royalties were almost identical to each other.

8   A   Yes, of course.

9   Q   All right. And you had some discussions

10   with Mr. Tucci about the 2.1 percent figure that was

11   attributed in your testimony to educational stations;

12   do you recall that?

13   A   That is a figure from Table --

14   Q   I think it's Table 8.

15   A   -- Table 8. Yes. In 1992, the PTV share

16   basic was 2.1 percent.

17   Q   Okay. And I am correct, am I not, that

18   that same figure also was one that appears in the

19   Copyright Arbitration Royalty Panel report of the 1990

20   to '92 proceeding, correct?

21   A   Appeared in the report. So far --

22   Q   You gave us a flat binder --

1   A   Yes. I'm trying to refresh my memory.

2   Q   Yes. You did read the 1990 --

3   A   Yes. Yes. Yes.

4   Q   Okay. Let me hand you a copy of that

5 report and direct your attention to Page 9; do you see

6 that?

7   A   Yes.

8   Q   And on Page 9, the Arbitration Panel

9 identifies the different categories of signals and

10 shows the basic royalties attributable to those

11 different categories, correct?

12   A   Yes.

13   Q   And for educational stations it shows the

14 2.1 percent figure.

15   A   Yes, as shown in my Table 8.

16   Q   Right. Those two are consistent, right?

17   A   Right.

18   Q   And you talked before about the

19 irrelevance of that 2.1 percent number, correct?

20   A   Yes.

21   Q   Do you know why the Arbitration Panel

22 would have included that 2.1 percent number in their

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'90 to '92 report?

A   Are you asking me why would they have included it at all?

Q   Yes, if it's irrelevant.

A   I don't recall the discussion around that table. I do recall that the CARP talked about that table, but I don't have the precise wording in front of me of what they actually said about the 2.1 or the table, in general.

Q   All right. That's fine. Let me ask you this: Part of the problem with that 2.1 percent number, as I understand it, from your conversation earlier, is that it's very difficult to identify exactly how much of the cable royalties can be attributable to any category of signal, correct?

A   Yes.

Q   Assume with me that one could precisely identify the amount of fees generated by a particular category, okay?

A   Yes.

Q   If one could do that, would you still believe that that number would be irrelevant for

1   purposes of making royalty allocations here?

2   A   It would remain an undependable measure of

3   a market-determined fee, yes.

4   Q   All right.

5   A   Because, again, these figures for

6   royalties are based on an arbitrarily set fee

7   schedule.

8   Q   Assume that we moved instead of the fee

9   schedule that we have here, that cable systems began

10   paying on a cents per subscriber per basis so that it

11   was possible to very precisely calculate how many

12   royalty dollars were attributable to the category of

13   signals; do you assume that?

14   A   You're asking me to assume a free market

15   for --

16   Q   No. No. I'm asking you to assume there's

17   a compulsory license for cable systems, but as if

18   often been thought might happen in the past, that they

19   actually moved to a system where the royalty structure

20   was replaced with a structure in which signals were

21   charged on a cents per subscriber per month basis.

22   A   All right. Let's take that world of cents

1   per subscriber.

2   Q   Right.

3   A   All right.

4   Q   Assume. Just assume for the moment that

5   what would happen is that public television station

6   signals were to be paid for at a rate of say 20 cents

7   per subscriber per month, okay?

8   A   All right.

9   Q   And we knew exactly how many subscribers

10   there were and exactly how many -- how much exactly

11   had been paid for those public television signals.

12   Would that total amount not be a good measure of the

13   value of that category of signal?

14   A   No, because that figure itself would be

15   set by mandate.

16   Q   And so in fact that the amount that could

17   be awarded to public television in those cases could

18   either be lower or higher than the amount that was

19   actually paid for for their signals, correct?

20   A   Under that structure, is the question

21   would fees generated through carriage of public

22   television signals be larger or smaller than today?

1   Is that the -- no.

2   Q   Let's just assume that we could determine

3   that the total amount paid for public television

4   signals was say a million dollars.

5   A   All right.

6   Q   Okay. We calculated all the cents per

7   subscriber per month, the number of subscribers, and

8   we said, look, we know that what was paid for these

9   public television signals was $1 million.

10   A   All right.

11   Q   Is it your position that that $1 million

12   number would not necessarily reflect the amount that

13   they should receive from this Panel?

14   A   Should receive in terms of what would be

15   a marketplace determination?

16   Q   Assume that the standard is still relative

17   marketplace valuations.

18   A   I'd still be suspicious of the number

19   because whatever cents per subscriber you set would be

20   a figure mandated by statute and would not necessarily

21   be reflective of the value of the programming to the

22   cable operator.

1   If I might just take a very quick example.

2   It's quite conceivable that a cable operator would pay

3   a low figure and pay rather little for the signal and

4   yet value it highly, would be willing to pay a lot

5   more than the signal costs.   And what I'm trying to

6   capture is that value, what is the willingness of the

7   cable operator to pay?

8   Q   Let's assume that -- one more set of facts

9   here -- that we knew that the cable operators paid $1

10   million for the public television signals, and they

11   paid $2 million for the superstations, okay?   Do you

12   have that?

13   A   All right.

14   Q   Is it your position that the arbitrators

15   here would not necessarily be required to award the

16   copyright owners of the commercial television

17   programming two-thirds of the Royalty Fund?

18   A   Let me think.   They would not necessarily

19   be moved toward that award relationship.   Again, it

20   would depend on all the other circumstances as well as

21   fees generated.

22   Q   Assume the same set of assumptions that I

1   gave you a minute ago: $2 dollars paid for

2   superstations, $1 million paid for public television

3   stations.

4   A   All right.

5   Q   Okay?   And how we have an arbitration

6   proceeding in which the Panel is charged with

7   determining the allocation between Commercial

8   Television Claimants, on the one hand, and Public

9   Television Claimants, on the other hand.   Do you have

10   that set of --

11   A   Yes.

12   Q   In that proceeding where relative

13   marketplace values is the standard --

14   A   Right.

15   Q   -- could the tribunal award something less

16   than or greater than one-third to the Public

17   Television Claimants?

18   A   Yes.

19   Q   And it would depend upon all the set of

20   facts.

21   A   Yes.

22   Q   And the fact that $1 million of that $3

million fund had been paid precisely for the carriage

of public television programming would not be

determinative of the award to the Public Television

Claimants.

A   Yes.

JUDGE GULIN: I have to explore that a

little bit further.

THE WITNESS: All right.

JUDGE GULIN: One might think that if

cable operators paid in $1 million to receive the

public television signals but it was actually worth

$1.5 million to them, because I think you indicated

that could be case --

THE WITNESS: Could be the case.

JUDGE GULIN: Could be the case. Then one

would say to oneself, well, why don't they buy $1.5

million worth if it was worth $1.5 million? Is the

answer simply they don't necessarily need it?

THE WITNESS: It's because the situation

is the same as with buying four apples. You're asked

how much would four apples be worth, how much are you

willing to pay? Say $1. How much do the apples

1   actually cost? Twenty cents. So 80 cents you pay,

2   and you have 20 cents extra, which we call consumer

3   surplus. Now, you ask, well, since I have that value,

4   why don't I buy an additional apple, the marginal

5   apple? And in fact the economic theory the purchaser

6   does purchase the product up to the point where the

7   marginal valuation is just equal to the price. And if

8   you had a totally continuous product, you'd say the

9   last unit I buy will be equal to valuation to the

10   price.

11   JUDGE von KANN: It's called price is

12   determined at the margin?

13   THE WITNESS: Yes. The price is

14   determined at the margin, as you've heard before.

15   JUDGE von KANN: Okay. As we've heard

16   before.

17   THE WITNESS: And what you have -- you

18   have a demand curve for apples, and let's say this

19   goes to ten, ten apples, to the price, and this goes

20   up ten cents, 20 cents. And you in fact buy apples to

21   the point where the last apple purchased has a value

22   to you equal to the price. And let's suppose the

1   price is here and you buy this many apples, and let's

2   suppose it's four.

3   COURT REPORTER: Could you keep your voice

4   up?

5   THE WITNESS: Yes.   Let's suppose it's

6   four.   Then this is the amount expended, this is

7   consumer surplus.   And I must say that one of the

8   confusions in this proceeding and in the earlier

9   proceeding   as   well   is   the   confusion   between

10   expenditures and values where we get into the question

11   of to what extent does supply side enter into all of

12   this? And the answer is, well, it enters into one and

13   not the other. I can go into that, but for the moment

14   let me say that what we are talking about here is

15   expenditure,   and   what   I'm   trying   to   get   at   is

16   valuation, because we don't know what the free market

17   price would be, and the best we can do is try to get

18   some handle on relative total valuation of the various

19   program   categories   as   a   way   of   moving   toward   an

20   outcome which is more consistent with what we would

21   expect in the marketplace.

22   JUDGE GULIN: Let me just follow up a

little bit. So I guess what you're saying is so long as the royalties that are paid into the Fund are something other than a fair market -- determined on something other than a fair market basis, that there can be no equivalence between what is put in and the value that is derived by one of the program suppliers.

THE WITNESS: Put it differently, we cannot depend solely on fees generated as the basis for making the award. We have to recognize that the relationship is tenuous at best with the underlying valuations. Let us look at other behavioral measures to see sort of what pattern emerges and to see if the fees paid approach is at least consistent. The change in fees, for example, over time could be 100 percent, 150 percent, which is consistent with the change in share of subscriber instances. We also look at viewing, how has viewing shares changed from 1992?

JUDGE GULIN: Did I hear you say in response to Mr. Garrett that you had not studied Dr. Rosston's --

THE WITNESS: No. I have not got into in detail. I read the written testimony, I've looked at

1   his equations and the output.   Interesting, very

2   interesting analysis.

3   JUDGE GULIN: Okay.   But you're not

4   prepared to render an opinion on it and how it fits

5   into this idea of fee generation?

6   THE WITNESS: Well, the numbers do, yes.

7   The numbers, as I recall, the coefficients certainly

8   showed a shift upward for public television.   The

9   coefficient was something like 7.5 something. I would

10   also insist that if one uses that methodology, one

11   would also have to include a portion -- adjust for the

12   3.75 Fund for reasons that I -- for the same kinds of

13   reasons that I discussed here, that if you're looking

14   at total --

15   JUDGE GULIN: I understand that.

16   THE WITNESS: I don't need to go back into

17   that. So one would have to add that in as well, and

18   it would be something in the upward from eight

19   percent, as I recall. But I have not gone through the

20   analysis systematically.   I'm not an econometrician,

21   but the results were significant in showing, along

22   with viewing shares, I might add, a very substantial

1   increase for public television.

2   JUDGE GULIN: Speaking generally about

3   what he did, essentially looking for the marginal

4   value of purchasing additional minutes, how does that

5   fit in with this idea of fee generation?

6   THE WITNESS: Yes. Well, that too

7   reflects the workings of fees paid in, but what I

8   would say in that case is that it's the value of those

9   coefficients relative to what we know from my analysis

10   that suggests that for public television a very

11   substantial increase in the award is justified.

12   JUDGE GULIN: Thank you. Sorry, Ms.

13   Garrett.

14   JUDGE YOUNG: Let me just ask one question

15   just following up on that. As I understand the

16   hypothetical that Mr. Garrett presented to you, he's

17   trying to illuminate the problem of sliding scales and

18   allocation problems. He's trying to come up with a

19   pricing mechanism for determining fees paid in that is

20   --

21   THE WITNESS: Yes.

22   JUDGE YOUNG: -- rational, uniform, not

subject to the kind of criticisms that you make.

THE WITNESS: Yes.

JUDGE YOUNG: And if one does that, you don't have any of those, again, illogical outcomes or sort of arguably arbitrary outcomes. And if a cable operator has to pay a penny a subscriber for any distant signal he uses, why isn't that reflective of how the cable operator values it. He's sort of saying, "It's worth it to me to pay X to get this distant signal, but it's not worth it to me to pay that distant signal." And so if we see a cable operator who never buys PTV and a pattern then emerges, isn't that reflective of the value they're putting on PTV?

THE WITNESS: Yes. That's looking at the marginal aspect, you know, how far does one go, and that's valuable. Again, I am not an econometrician. I think this analysis is very useful for the CARP to consider, and the point, again, I would make is that the evidence I have seen from a variety of sources suggests strongly that that award be increased and again reflecting the massive change in industry

structure. I think the regression analysis, I think, captures that, the point about looking at behavior at the margin is certainly very relevant to the consideration, and it all comes together -- the evidence comes together in a convincing way with respect to public television.

MR. GARRETT: Did you want me to ask more?

JUDGE GULIN: Try again.

(Laughter.)

BY MR. GARRETT:

Q   Oh, my. Let me ask you this, Dr. Johnson: You did look at instances of carriage in your analysis here, correct?

A   Yes.

Q   And you decided to move away from instances of carriage because of certain problems that you saw in that.

A   Yes.

Q   And you're aware that in prior proceedings the Public Television Claimants have urged CRT, or the CARP, to tie their award more closely to instances of carriage.

1   A   Yes.

2   Q   And you would disagree with that approach.

3   You would not say that their award should be tied to

4   instances of carriage.

5   A   True, yes.

6   Q   And you're aware of what the CRT and the

7   prior CARP have said about instances of carriage,

8   correct?

9   A   Yes.

10   Q   Now, if we nevertheless looked at the

11   change in instances of carriage for public television

12   between '90 to '92, on the one hand, and '98 to '99,

13   what would be the result for Public Television's

14   award?

15   A   If we looked at --

16   Q   Just the change in their instances of

17   carriage between '90 to '92, on the one hand, and '98

18   to '99, on the other hand.

19   A   Okay. Shown in Table --

20   Q   Table 2.

21   A   Well, Table 2 or Table 3 if we adjust for

22   the 3.75 Fund, it shows the PTV share rising by over

1   90 percent.

2   Q   So it really -- in this case, it doesn't

3   make any difference whether you look at instances of

4   carriage or subscriber instances of carriage.   In

5   either case, Public Television's share would be, in

6   your opinion, about the same.

7   A   Close.   Close.   The share would be

8   somewhat lower with subscriber instances but still in

9   the double-digit arena.

10   Q   Right.   If they went from 7.2 percent in

11   '92 to 14 percent in 1999, that would suggest an award

12   of close to 10.7 percent, which is the same award that

13   you're suggesting by looking at the subscriber

14   instances, right?

15   A   Yes.

16   Q   Let me just ask you about the first very

17   simple analysis that you did about TBS.   On Page 3 of

18   your testimony, if I could ask you to turn to that, in

19   that first full paragraph, about five lines down, when

20   you talk about the TBS conversion you say that that

21   conversation should have no effect on the dollar value

22   of royalties paid by cable operators for non-

1   commercial programming, correct?

2   A   Within the confines of the simple model,

3   yes.

4   Q   Okay. And so in that simple model what

5   you're doing is you're looking at what the Public

6   Television Claimants received in '97 and saying that

7   they should receive essentially the same dollar amount

8   for '98.

9   A   Yes.

10   Q   Okay.

11   A   Going through the adjustments I conclude

12   then that the award would rise to seven percent for

13   1998, for example.

14   Q   So if they got seven percent, then that

15   would take care of any of the effects of the TBS

16   conversion as far as the Public Television Claimants

17   are concerned.

18   A   No. Because, again, I'm starting out with

19   a crude model to illustrate the kinds of distortions

20   that arise because of the allocations of the minimum

21   fee, allocations that are more pressing today than

22   they were prior to the departure of WTBS. And what I

1   conclude is that we need -- in looking at the whole

2   period, we need a different methodology. We cannot

3   look at, again, fees generated if we seek solutions

4   that move toward what we visualize as a marketplace

5   outcome.

6   Q   I want to just focus again on just the TBS

7   conversion and what that does to the Public Television

8   award, in your estimation. You talk about maintaining

9   a dollar award. What is that particular dollar award

10   that needs to be maintained to account for the TBS

11   conversion?

12   A   I'm just asserting here that since WTBS

13   did not carry non-commercial programming, Public

14   Broadcasting should remain as it was in terms of

15   dollars, using again this methodology that I wanted to

16   use for illustrative purposes basically to show how

17   difficult or troublesome it is to use this methodology

18   in looking at the overall time period.

19   Q   Well, there's -- you must have some

20   particular dollar award in mind here for 1997,

21   correct?

22   A   Would you repeat the question, please?

1   Q   Yes. On Page 3, again, you talk about the

2   need to maintain a dollar payment for Public

3   Television, correct?

4   A   Yes. Yes.

5   Q   And you look at the 1997 year and say, as

6   I thought -- I thought what you were suggesting is

7   that the amount that they received, that is Public

8   Television received, in 1997, ought to be maintained

9   into 1998, correct?

10   A   Within the context of this simple model.

11   Q   Yes. That's all. I jus want to deal with

12   this simple model.

13   A   Yes. Yes. I was trying to make the point

14   that that when the size of the pool falls awards need

15   to be adjusted simply to account for the fact that the

16   size of the pool has fallen, if an objective is to

17   insulate one of the claimants from this particular

18   change where that change really had nothing to do with

19   the activities of that claimant. But, again, in a

20   simple model and using a methodology that is not

21   reliably usable for long-term analysis.

22   Q   I understand. Again, I just want to focus

1   on the simple methodology and your determination that

2   that's what one would use in order to maintain Public

3   Television's dollar payment, correct?

4   A   Yes.

5   Q   And I want to know what that dollar

6   payment is that needs to be maintained for 1998 and

7   1999, the dollar payment.

8   A   It was basically maintaining the same

9   dollar payment, given the reduction in pool size and

10   taking into account the minimum fee that I computed,

11   the share for Public Television, taking into account

12   that the share relates only to the Basic Fund. So I

13   came then to the calculations at the bottom of Page 6

14   and the top of Page 7. But then I immediately turned

15   to four cautionary points.

16   Q   Would it be fair to take PTV's 5.5 percent

17   award and apply it to the 1997 Basic Fund to determine

18   the amount that needs to be maintained here for 1998-

19   1999?

20   A   Well, immediately this is illustrative,

21   and if one were faced with a very narrow question

22   about an adjustment, then these are the figures I'd

1   compute. If we talk about the relevance of these

2   figures to the task that the CARP faces, I'd have to

3   say that the relevance is mostly in terms of

4   illustrating a problem, not in terms of providing a

5   basis for an award extending over this number of

6   years.

7   JUDGE YOUNG: Maybe you could just

8   represent what you think the number is.

9   MR. GARRETT: I don't have that. I wanted

10 him to do the specific calculation. But let me just

11 ask you it this way here: On Table 1, Page 5, you

12 show for 1997 the Basic Fund of $114.5 million,

13 correct?

14   THE WITNESS: Right.

15   BY MR. GARRETT:

16   Q   And if we took 5.5 percent of that Basic

17 Fund, would that be the award that you are trying to

18 maintain here for Public Television, just to account

19 for TBS under your simple model?

20   A   I think so, but I have not done the

21 calculation to track that exactly.

22   Q   Okay.

1   A   But I see the thrust of your query, and in

2   the approach in the Basic model -- in my simple model

3   is in that direction.

4   Q   On Table 1, the data that you have there

5   differs   from   some   other   data   we   have   in   the

6   proceeding.   I just want to make clear what you've

7   shown there are the overall total is just -- and say

8   for 1998 and 1999, is that the overall total minus the

9   Form 1 and Form 2 systems?

10   A   Yes.   Yes.   We are dealing here only with

11   Form 3 systems.

12   Q   Okay.   Dr. Johnson, on Page 16 of your

13   testimony, you state down there at the -- the final

14   paragraph, second line, you say, "After all, everyone

15   knows that movies, sports, syndicated shows have such

16   a great popular appeal," do you see that?

17   A   Yes.

18   Q   And then you make a similar statement on

19   Page 21, the second full paragraph.   Do you see that,

20   second full paragraph, third line, "We are all aware

21   of how popular our movies, sports, syndicated shows

22   and such."

1   A   Yes.

2   Q   Would you care to elaborate at all about

3   the popularity of just sports?

4   (Laughter.)

5   MR. DOVE: Are you a Cubs fan?

6   BY MR. GARRETT:

7   Q   There's no need for you to do that, Dr.

8   Johnson.

9   A   With respect to sports or to answer the

10   question, in general?

11   Q   I think you've told us how you feel --

12   A   All right.

13   Q   -- on all this.   I can tell when

14   somebody's not a Cubs fan.   I have no further

15   questions. Thank you, Dr. Johnson, for your time.

16   A   Pleasure being here.

17   JUDGE von KANN: Okay. I guess we are up

18   to Music.

19   MS. WITSCHEL: We have a few questions.

20   JUDGE von KANN: Okay. Let me -- I'll

21   tell you what: Before Mr. Garrett leaves the

22   microphone, let me ask a little bit about one line of

1   questioning that he raised, because perhaps it might

2   be -- he might want to follow up on it a tiny bit.

3   And I want to try to make sure I understand your

4   answer. Judge Gulin asked about this as well. And

5   that goes to the question of whether or not if the

6   CARP is attempting to make a marketplace distribution

7   of these royalty funds it is appropriate to base that

8   distribution totally, I guess, on the amounts that

9   were paid in for the different program types if that

10   could be determined with precision.

11   And Mr. Garrett postulated a situation, as

12   I understood his question, in which Congress, I guess,

13   said, hence forth everybody will pay one penny per

14   subscriber for different kinds of programming, and

15   we're setting some rates. We're going to say 20 cents

16   is the charge for public television and something

17   else, I guess, for other programming types.

18   And I think he asked you, as I understood

19   it, would it be appropriate in that situation to, in

20   attempting to make a marketplace distribution, to

21   simply look at the amounts that had been paid in for

22   public television and look at the amounts for

1   broadcast, and I believe your answer was, no, in part

2   because the pay-ins were not marketplace determined.

3   Somebody said thou shall pay 20 cents for public

4   television and thou shall pay something else for

5   broadcast, and that's not a marketplace process. So,

6   you know, garbage in, garbage out. If you don't get

7   marketplace pay-ins, you don't just dole out the same

8   amount and say, "Ah, we distributed on a marketplace

9   basis." Is that essentially right?

10   THE WITNESS: That's exactly right.

11   JUDGE von KANN: Now, what if we could

12   suppose for a moment that -- and this is all getting

13   pretty theoretical and whether it will help us at the

14   end of the day will remain to be seen -- that we had

15   the first part of Mr. Garrett's hypothesis, from now

16   on everybody shall pay one cent per subscriber, and

17   Congress said, "And by the way, you guys negotiate

18   your rates, decide what you want to pay for public

19   television and what you and public television can

20   agree to, decide what you and the broadcasters can

21   agree to." They didn't say 20 cents for public

22   television. They said whatever the buyers and sellers

1   in this market can agree to that will be what you pay

2   for public television, and whatever the buyers and

3   sellers can agree to for broadcast, that's what you'll

4   pay for broadcast. So we have sort of Mr. Garrett's

5   construct except we take out of it somebody imposing

6   rates.   The rates get determined through free

7   marketplace negotiations.

8   If one had that regime, then it would seem

9   to me one could make a respectable case for saying,

10   "And, therefore, if you're going to distribute this in

11   a marketplace fashion, since the marketplace

12   determined the pay-ins, then you ought to just give

13   everybody what they got, because it was a marketplace

14   determination in the first instance."

15   THE WITNESS: That is true.

16   JUDGE von KANN: Is that correct?

17   THE WITNESS: Yes, that is correct.

18   JUDGE von KANN: And I guess as it applies

19   to us here, your view is we're more in the first kind

20   of regime than the second because we've got these sort

21   of arbitrary allocations, we've got these kind of

22   sliding scale rates.   The pay-ins are not being

1   determined in a marketplace fashion, and therefore if

2   you use those as the payouts, you're not getting a

3   marketplace distribution. Is that what it amounts to?

4   THE WITNESS: That is true.

5   JUDGE von KANN: Okay. And I guess one

6   could imagine a regime in which Congress would say

7   these are the sliding scales and these are the way the

8   allocations will work, and to hell with the

9   marketplace, give everybody what was paid in for them.

10   It's not going to be a marketplace. One could have

11   that kind of a system, we don't, however. We have one

12   in which presumably we've been told distribute it as

13   best you can in the way a free marketplace would do

14   it.

15   THE WITNESS: Yes.

16   JUDGE von KANN: And in that -- given that

17   task by us, it does not make sense to look at the pay-

18   in figures as determinative; is that right?

19   THE WITNESS: True.

20   JUDGE von KANN: Okay. If that prompts

21   any question, Mr. Garrett, before you leave, you're

22   welcome to follow up, because it was sort of an

1   extension of a line you were pursuing.

2   MR. GARRETT: No, I have nothing further

3   on that, although I realized I have been delinquent in

4   one matter. At the break, Mr. Hester asked me to

5   remind everyone that the rise in Public Television's

6   award came after his entry into this proceeding

7   JUDGE von KANN: Oh. Okay.

8   MR. GARRETT: And I did not want to

9   suggest anything to the contrary.

10   (Laughter.)

11   JUDGE von KANN: Okay. All right.

12   MR. HESTER: Thank you, Bob.

13   MR. GARRETT: You're welcome, Jim.

14   JUDGE von KANN: Okay.

15   BY MS. WITSCHEL:

16   Q   Good afternoon, Dr. Johnson. I just have

17   a few questions for you. I'm Carol Witschel, and I

18   represent the Music Claimants. Your study doesn't

19   attempt in any way to calculate the value of the music

20   that's used in public television; is that correct?

21   A   That is correct.

22   Q   And I believe as part of your study you

1   gave some or weighted some of the values based on the

2   fees generated.

3   A   Yes.   I   have   shares   based   on   fees

4   generated.

5   Q   And   is   it   appropriate   or   is   it   an

6   economically   sound   approach   to   apply   additional

7   weights based on the higher fees paid?

8   A   I don't understand the question.   Could

9   you rephrase the question?

10   Q   I'll withdraw it. You discussed the Bortz

11 survey a little bit in your written testimony.

12   A   Yes.

13   Q   And you discussed it a little bit here

14 today.

15   A   Yes.

16   Q   That study ignores entirely the value of

17 music that's used in the various programming types

18 that are asked about, right?

19   A   Yes.

20   Q   And I think you started in your study, as

21 I understand it, you've compared what the awards was

22 in 1990 to 1992 and then done an extrapolation as to

1   what it should be today.

2   A   Yes.

3   Q   Based on the chain of circumstances

4   between 1990 to '92 as compared to 1998 and 1999; is

5   that right?

6   A   Yes.

7   Q   And you started with the Librarian's

8   adjusted 1992 values or award for Public Television?

9   A   You're referring to the footnote, I

10   believe, on Page --

11   Q   That's right, Footnote 1 on Page 3.

12   A   Yes. What I recall the original award was

13   5.75 adjusted downward because of the inclusion of

14   Music in the Fund out of which that award was to be

15   made.

16   Q   And is it your understanding that what the

17   Librarian did in that adjustment was take Music's

18   share off the top?

19   A   To take it off the top, in one case it was

20   -- Music was considered separately, and there was an

21   award made of 5.75 for that remainder. And then when

22   it was decided by the Librarian of Congress to

1   included Music within that pool, the award was

2   adjusted downward to 5.5.

3   If the Music award remains at 4.5, then

4   that would be consistent with my recommended awards of

5   over 10 percent.   Were that Music award adjusted

6   upward or downward, then that would correspondingly

7   affect my computation.

8   Q   In 1992 what the Librarian did though was

9   take the Music share off the top and then adjust

10   everyone else's shares accordingly?   Is that your

11   understanding?

12   A   I thought it was the other way -- what was

13   it -- it was decided -- the CARP award failed to

14   include the settlement of the Music claimants in the

15   total distribution percentages.   It was taken

16   separately and, on that basis, the public television

17   award was set at 5.75.

18   However, the Librarian corrected this

19   error in its final distribution order, adjusting the

20   PTV percentage share to 5.49 percent because now, in

21   that determination, Music was then included and the

22   pool got larger and, consistent with my previous

1   testimony in that case, then the appropriate award for

2   public television would fall and it was therefore

3   adjusted downward.

4   Q   Your study assumes that Music's share will

5   remain constant; is that right?

6   A   Well, yes, in so far as my computations

7   are concerned, but recognizing that were the Music

8   share adjusted upward or downward, that would have an

9   effect on my calculation.

10   Q   Now, you talk in your study or report

11 about the impact of the shift of WTBS over to a cable

12 network?

13   A   Yes.

14   Q   Now, it's not your position that Music

15 claimants' share should be reduced because of that

16 shift?

17   A   I have not looked at that issue.

18   Q   Thank you.

19   MS.   WITSCHEL: I   have   no   further

20 questions.

21   JUDGE   von   KANN: All   right.   Mr.

22 Satterfield?

1   MR. SATTERFIELD: No questions.

2   JUDGE von KANN: No questions.   Mr.

3   Stewart?

4   MR. STEWART: I just wanted to say that,

5   even thought I appreciate the fact that my friend, Mr.

6   Garrett, tried to bait me into cross examining this

7   witness by pointing out that we go down too, and

8   although I'm tempted to join in the fun that I've been

9   observing all day, I hope to demonstrate I'm smarter

10   than I look and I still have no questions.

11   (Laughter)

12   JUDGE von KANN: Is there anything you'd

13   like to say about Sputnik?

14   (Laughter)

15   MR. STEWART: I have a story, but it's

16   similar to that one.

17   (Laughter)

18   JUDGE von KANN: Okay.   We're at redirect

19   and I'm wondering if you would like the courtesy of a

20   break now?

21   MR. DOVE: I would.

22   JUDGE von KANN: I thought you might.   Why

1   don't we take 15 minutes and come back at 4:00

2   o'clock.

3   (Whereupon, the proceedings went off the

4   record at 3:45 p.m. and resumed at 4:05 p.m.)

5   JUDGE von KANN: Okay.

6   MR. DOVE: Good afternoon again, Dr.

7   Johnson. I think we're almost finished.

8   THE WITNESS: Good afternoon.

9   MR. DOVE: I've just got a few additional

10   questions just to clarify a few points that were made

11   during cross-examination.

12   REDIRECT EXAMINATION

13   BY MR. DOVE:

14   Q   Do you recall being asked about instances

15   of carriage and the relevance of instances of carriage

16   as a measurement?

17   A   Yes.

18   Q   Could you expound on that and just explain

19   what you believe the relevance of instances of

20   carriage to be in your analysis?

21   A   Yes. instances of carriage provide a

22   useful point of departure in looking at the choices

that cable operators actually make, votes, so to speak.

To be sure, they don't represent a perfect measure of votes. There are minimum fee distortions that come in. But when we look at the magnitude of instances of carriage and how that has changed during the time before from the time before the minimum fee requirement became such a distorted factor; that is, before the departure of WTBS, and traced down to 1998-1999, we can conclude that, you know, this is a body of very useful evidence to suggest how cable operators choose among various types of distant signals.

They are also, however, instances of carriage and in perfect measure because they don't take into account the difference between partial distant signals, full distant signals. They don't take into account subscriber size. Clearly those adjustments need to be made. And so I do that.

And that's why subscriber instances is a stronger approach in providing the next step toward a final determination. You know, you will know whether

1   we use instances of carriage or the more refined

2   subscriber instances, the results are still roughly

3   the same.   That is, there is still a very large

4   change, nearly a doubling, whether we use one or the

5   other. But I like to use the most refined possible

6   measure. So I begin with subscriber instances.

7   Q   Dr. Johnson, do you also recall some

8   questioning involving the issue of relative

9   marketplace value and whether your analysis and the

10   ultimate result of 10.3 percent and 10.7 percent for

11   the two years in question, whether that is reflective

12   of your relative marketplace values?

13   A   Yes.   Those figures are reflective of

14   marketplace values.

15   Q   Why is that?

16   A   Because we take, first of all, the fact

17   that these data do represent choices being made by

18   cable operators. And we then place that within the

19   context of using the CARP award of 1992 as the anchor,

20   as the basis, then, for extrapolating.

21   I am concluding that, you know, based on

22   the proceedings before the CARP that the CARP came up

1   with a good, tolerably good, at least, marketplace

2   measure of the award, that it took into account a

3   variety of sources of information, it concluded that

4   the award to be TBS should be 5.5 percent,

5   conservative but reasonable.

6   And I take that as reflective of

7   marketplace forces at the time. The CARP did a good

8   job in sorting through the evidence and making a

9   reasonable determination.

10   And then I extrapolate from that using

11   evidence reflective of the kinds of choices actually

12   made to come up with a recommended award, then, that

13   also embodies a recognition of marketplace outcomes.

14   Q   Finally, Dr. Johnson, why did you choose

15   to use the 1990 to 1992 award as your anchor, as your

16   base, as opposed to the numbers or the years that Mr.

17   Garrett was suggesting, 1979 or 1989 or any of those

18   older years in between? Why did you do that?

19   A   Because that was the most recent award set

20   in an environment that more closely ensembles today's

21   environment than did the environment of 1978. In any

22   kind of extrapolation, it becomes increasingly

1   difficult to come out with a reliable endpoint where

2   many, many changes occur in the meantime, more

3   difficult to extrapolate from 1978 to 1998 than from

4   the shorter period of the early '90s.

5   And since -- and, after all, it is the

6   award made in the 1990-1992 proceeding, you know, that

7   is subject to being adjusted. That is the award that

8   was in place. It has not been adjusted. And the

9   challenge before the CARP, as I take it, you know, is

10   how should that award be adjusted?

11   And I am saying that with my procedure for

12   extrapolation using that award as the anchor, using

13   subscriber instances adjusted again, to recognize

14   differences in program valuation, again, using the

15   92.4 percent figure, not parity, that we arrive at the

16   best marketplace determination I can think of given

17   all of the methodologies that we might select from.

18   MR. DOVE: I have no further questions.

19   JUDGE YOUNG: I have been struck

20   throughout the course of your testimony about your

21   asking us to rely on the adjustments made in 1990-92.

22   We as a panel have reviewed the direct case submission

of PTV's other witnesses.

THE WITNESS: Yes.

JUDGE YOUNG: We have obviously sat through the direct testimony and the cross. We didn't want to use '90-'92, but we wanted to make our own judgments as to what kinds of adjustments were appropriate, up or down.

THE WITNESS: All right.

JUDGE YOUNG: Could you summarize what you think we should look at?

THE WITNESS: Yes. Well, again, take my recommended awards of 10.3, 10.7. Those also stand on their own in the following sense, that if we take sort of rough parity as a measure again, if a discount factor of 92.4. It's that figure that I take from the CARP decision.

If one wants to revisit the whole area, paying no attention to that, then one would ask the question, you know, do we have parity or not in the valuation of Public Television programming and commercial television programming?

And, again, what I mean by parity is that

1   the value of in my illustration --

2   JUDGE YOUNG: I understand the concept of

3   parity.

4   THE WITNESS: Yes.

5   JUDGE YOUNG: The question is, you know,

6   you suggest that we don't believe there should be

7   parity. We should make an adjustment to use one

8   figure as a guide from '92-'90, saying that they

9   carefully took into account all of the issues. And

10   presumably part of our charge is to carefully take

11   into account all of the issues.

12   THE WITNESS: Right.

13   JUDGE YOUNG: There's been some changes

14   since 1992 to 1998-99.

15   THE WITNESS: Right.

16   JUDGE YOUNG: And I'm saying if we wanted

17   to look at the evidence presented to us and we wanted

18   to make adjustments or at least decide whether we want

19   to make adjustments or not, what do you point to we

20   should look at that is in this --

21   THE WITNESS: Right. Pointed out, yes.

22   Look at viewing shares. How have viewing shares

1   changed? As I recall, the Public Television viewing

2   share was up to like 15 percent, a marked change from

3   early years. If these subscriber instances were of

4   little value, we would expect viewing shares not to

5   increase by that much.

6   Now, granted, viewing shares are not a

7   perfect measure of value either. There is a long

8   record suggesting why you cannot rely alone on viewing

9   shares, but in terms of a body of evidence, evidence

10   that fits together, recall that the PTV share of

11   subscriber instances is double digit. Recall that

12   viewing share is now double digit depends on the

13   audience, but even in the prime audience, it's well

14   above 10-11 percent, very high for children, very high

15   for older people, but in the middle also high.

16   So you would certainly want to take that

17   into account, again, the change as a way of supporting

18   the notion that, indeed, the Public Television share

19   should be adjusted upward and very substantially.

20   There are other considerations --

21   JUDGE YOUNG: That is adjusting it upward

22   from the '90-'92 share?

1   THE WITNESS: Yes, right.

2   JUDGE YOUNG: I'm talking about what

3   adjustments   are   appropriate,   the   basis   for

4   adjustments,   as   against   the   subscriber   instance

5   analysis.

6   JUDGE von KANN: If you used a starting

7   point other than the 1990 to '92 award. Is that what

8   you're asking?

9   JUDGE YOUNG: Yes, not to do what Dr.

10   Johnson   has   suggested,   which   is   to   look   at   the

11   subscriber instance model and then adjust on the 92.4

12   percent of --

13   THE WITNESS: Yes.   Let me go back to

14   table 4. What I would say, then, is that we take out

15   '92, eliminate that, take out the change.   Forget

16   about the 5.5 percent award for the moment.   Set it

17   aside.   And   simply   ask   the   question,   what   do

18   subscriber   instances   tell   us   about   the   award   that

19   would be appropriate for Public Television?

20   So we see here 1997, and we see the very

21   substantial change brought about in large part during

22   that time by the WTBS departure.   And I assume that a

1 major reason why we are here is because of the seismic

2 effect that that departure had on the industry.

3   And so now we are trying to decide about

4 an award, not an adjusted award now. We are now in

5 the time period beyond '92. And we say that the PTV

6 share is shown here at 11 percent.

7   Now, is that a reasonable determination?

8 Could we not just set the award at 11 percent for '98?

9 And the answer is no because this assumes that all of

10 the subscriber instances are equal in value, that the

11 programming they carry is of equal value.

12   And what I'm saying, that is a reasonable

13 assumption in a sense if we're talking about averages,

14 if we're talking, again, in my simple example about

15 the one signal versus the 999 --

16   JUDGE YOUNG: No. I'm there with you.

17   THE WITNESS: Okay. Yes.

18   JUDGE YOUNG: And then the question is,

19 well, how do you make the adjustment off of that?

20   THE WITNESS: And then you would ask,

21 should we make an adjustment for Public Television?

22   JUDGE YOUNG: And now looking at the

1   evidence here today --

2   THE WITNESS: Yes.   And looking at the

3   evidence here today, you would go to a table like

4   table 7.   And you would ask the question, well, how

5   many cable systems are carrying distant signals, both

6   public and commercial?   What does the distribution

7   really look like?   And here are the numbers.

8   These are full subscriber instances on the

9   left.   And I think of these as votes.   And we have the

10   distribution of distant signals, only a couple at

11   most.   But there are partials also, but I don't take

12   those into account.

13   So we have 24 systems that carry a second

14   distant PTV signal.   And we have the subscriber

15   instances, subscriber instance share.   And we know

16   from past testimony that the cable operators that

17   carry public stations value those stations highly.

18   They don't buy a lot of them.   They don't

19   buy a fourth or fifth signal.   Well, go through the

20   pool in procuring additional distant signals beyond a

21   couple, but those signals are valuable.

22   Now, we have non-Public Television.   And

1   we see, well, they carry a lot more signals. And I

2   said in sort of playing the devil's advocate, well,

3   what about all of those programs with mass appeal?

4   You know, surely those programs have more value than

5   Public Television. And that's shown here.

6   You have lots of those, an enormously

7   larger total of the 47.5 subscriber instances than the

8   5, just like the one is a lot less than 999. And so

9   you ask, well, what is the average value of Public

10   Television relative to non-Public Television?

11   Now, if it's true that that first signal

12   carried by cable operators in the Public Television

13   arena, if that signal is as valuable on average -- and

14   let me emphasize again on average -- all of those

15   signals below, then we have parity. And we can, then,

16   use the 11 percent for the award.

17   Now, why does one conclude that a parity

18   is a reasonable assumption? Well, lots of reasons

19   that I discuss later on. For example, Public

20   Television faces much less competition in the local

21   market with local Public Television stations. There

22   is one typically. There are in many cases zero in my

corrected page.

I said that 37 percent of PTV subscriber instances involve cable systems with no local PTV signals. Now, that means that if I take all instances of carriage or, I should say, subscriber instances for Public Television, that something over 30 percent of those are carried in the absence of a local Public Television station.

Now, it's reasonable to conclude that those signals are particularly highly valued. On the other hand, when we come to commercial signals listed here, those signals are in fierce competition with a lot of local stations.

That first signal carried by the 1,081 systems is competing with a large number of local signals, as I have it here, as shown in table 7, in 92 percent of the 29.1 million subscriber instances were generated by cable systems with access to at least 5 local signals.

JUDGE YOUNG: Let me play devil's advocate for a second. Couldn't one make the argument that in those instances, even when they have local

1   broadcasting systems, somebody is making the decision

2   that it is worthwhile and it's valuable to get another

3   local broadcasting commercial TV station?

4   THE WITNESS: That's exactly right, yes.

5   And why? Because that programming does have appeal,

6   the 999 number. There is a lot of demand for movies,

7   a lot of demand for syndicated. And that is shown

8   directly in table 7.

9   But I am saying, taking that into account,

10   how do you arrive at the decision about relative

11   valuation? Those are the kinds of consideration you

12   take into account. How many local signals are there

13   in the market? Is only one distant signal being

14   carried or many because if only one is being carried,

15   it has a weight of 100 percent. That very much

16   affects the average value.

17   JUDGE YOUNG: Okay. I think I get it.

18   THE WITNESS: And so it's a complicated

19   process, but I think you are well on the way to coping

20   with it, Judge.

21   THE WITNESS: That's a nice way to end.

22   JUDGE von KANN: I don't know whether that

1   prompted any follow-up questions. No? Okay. Dr.

2   Johnson, thank you very much. You are excused at this

3   point. Let me just have a few moments with counsel.

4   You are welcome to go back if you want. It's always

5   good to get off the witness stand in case somebody

6   thinks of something.

7   THE WITNESS: Thank you very much.

8   JUDGE von KANN: Thank you.

9   (Whereupon, the witness was excused.)

10   JUDGE von KANN: Because we are a little

11   bit ahead of schedule here, I thought maybe we should

12   take a couple of minutes to take stock of a few

13   things. Monday noon we will be at the midpoint of the

14   direct case phase for those of you who have been

15   counting.

16   And we are conscious of the fact that when

17   that phase ends on, I think it is, the 11th of June,

18   you all only have nine days before you file your

19   rebuttal cases on June 20th. There's not a lot of

20   time there.

21   So, first of all, we have been thinking a

22   little bit about whether there are any items that we

might like to ask you to address or include in the

rebuttal case. And you needn't take out any notes yet

because we haven't figured it out, but we're thinking

about it. And we hope to try to get back to you

before too long so that we don't hit you with at the

very end, "Oh, by the way, couldn't you?"

There is one thing we have been ruminating

a little bit about. And I don't know that we have

exactly figured out how to deal with it, but it's an

issue that is of a little bit of concern to us. And

we thought we would maybe just throw it out to you and

let you all think about it a little bit. And then we

can talk later about how we deal with it.

And I am going to call on my colleague

Judge Gulin to sort of explain that issue.

JUDGE GULIN: I didn't know we were

bringing this up now, but it has to do with the manner

of doing certain calculations. None of us are

mathematicians here.

We will have to come up with perhaps a

list of the types of calculations that we may be

called upon to do. And hopefully you can give us some

1   sample calculations.

2   I know Mr. Dove did a sample calculation

3   if we wanted to make certain adjustments to Dr.

4   Rosston's approach. And I think we followed it, but

5   it would be nice to have some sample calculations like

6   that, even something as simple as making an adjustment

7   to one of the groups, how that affects the other

8   group.

9   Obviously we have to make that adjustment.

10   Does it matter if we are adjusting one group up and

11   another group down, whether we do it in any particular

12   order? Does it have to be done simultaneously? It's

13   not something I've sorted out in my mind, but those

14   type of simple-type calculations, it would be nice to

15   have some samples.

16   So we're wondering if perhaps that could

17   be done as part of the rebuttal cases or maybe you

18   feel it is better to do it in proposed findings. I

19   think we would probably prefer to see something

20   earlier than proposed findings so we can start playing

21   with the numbers, so to speak, in our own minds.

22   I'm sure there are some other examples of

1   the types of calculations that don't come to mind

2   right now.

3   JUDGE von KANN: That is the mechanics, if

4   you will, of doing the math here. I think Judge Gulin

5   has pointed out one example is if we were to buy PBS'

6   argument and we say, "Well, you don't participated in

7   the 3.75 and we need to make an adjustment," what is

8   that formula or how is that done? How do you move

9   different people up and down simultaneously?

10   So any help you could give us so we don't

11   screw up the math we would welcome. That is one thing

12   we have been thinking about a little bit.

13   I think there are two or three other. I

14   try to keep a list of sort of open items, things that

15   we have talked about but haven't brought closure on.

16   We have on that list still the question of getting

17   these settlements for the devotionals and NPR into the

18   record.

19   I think it was indicated earlier you all

20   were going to try to discuss that among yourselves and

21   with those parties. And you felt optimistic that you

22   could probably reach a resolution. But I guess it

1   hasn't happened yet.

2   Another issue that we just threw out to

3   you a while ago, how do you want to handle the

4   rebuttal discovery. Do you want to have an exchange

5   of letters a day or two before the July 2nd hearing or

6   did you just want to walk in here cold and talk to us

7   about it? I think we probably would like to get a

8   resolution on that before we adjourn.

9   And there may be we've also got this issue

10   of JSC 100, but I think that is probably going to work

11   itself out. We thought it might be helpful to set a

12   target date to bring these things to resolution,

13   rather than have them just sort of drift.

14   And it looked like a good time might be

15   after lunch on May 29. The reason I say that, we're

16   booked solid tomorrow and all next week. So you don't

17   have a free weekday to talk to one another until

18   Tuesday, May 27th.

19   May 28th is the Canadian claimant's expert

20   witness. I don't know how long a day that will be,

21   but the following day, the 29th, is the sports wrap-up

22   day, which is, as I understand it, Mr. Selig and one

1   cable operator.

2   Our guess was that that might be a

3   somewhat lighter day. We don't have an expert witness

4   on. And, therefore, if we set 2:00 o'clock that day

5   after lunch, to hear a report from you all if you have

6   reached a resolution on the settlements, fine.

7   If not, I'm inclined to think we ought to

8   get the devotional counsel in here and the NPR counsel

9   and hear everybody out and try to decide it. And

10   maybe you'll have reached a resolution about how to

11   handle the discovery issues or maybe you haven't, but

12   we thought maybe everybody should pencil in that day

13   as a hopefully wrap-up administrative matters kind of

14   day. Maybe some others will have come along by then.

15   Maybe not.

16   Let me ask people. Does that strike you

17   as time enough to bring to a head this issue of the

18   settlements? I think sometimes in my experience, it's

19   helpful for counsel to be able to say, "The panel has

20   given us a deadline. We need to bring this to a

21   conclusion. Let's see if we can reach an agreement or

22   if we can't, let's go down and argue it out."

1   Is that a time frame that would seem to

2   make sense for people to do that? I see some

3   affirmative nodding. Mr. Dove?

4   MR. DOVE: Maybe we can eliminate one item

5   from the list.

6   JUDGE von KANN: Okay.

7   MR. DOVE: This is not evident from the

8   Copyright Office, the order that is actually, the

9   scheduling order that is in the Federal Register.

10   JUDGE von KANN: Okay.

11   MR. DOVE: If the parties had agreed among

12   themselves that after the rebuttal case was due on

13   June the 20th, we have agreed to a procedure where

14   follow-up discovery requests are due on the 23rd.

15   Responses to follow-up requests were due on the 25th.

16   Notifications of remaining discovery disputes was on

17   the 27th of June. And then responses to notification

18   of remaining discovery disputes was on Monday, June

19   30th. I believe the idea was that that would give

20   each of the parties a sense of what the disagreements

21   were and to the extent the parties couldn't work those

22   out, that those would be addressed orally at the

1   hearing on the 2nd. I don't know if that --

2   JUDGE von KANN: I think that sounds fine.

3   It sounds like what we would need to do, I guess, is

4   see your June 27 and June 30 documents on anything

5   that remains outstanding. I think if it's gone away,

6   we don't particular need to see it.

7   But maybe what we need to do is have a

8   deadline of, say, noon on July 1st. If you still have

9   an issue, we would get a copy of those two documents

10   so we could at least read them the night before and

11   walk into the hearing a little more knowledgeable.

12   Would that make sense?

13   Let me see if I get it. On June 27th, any

14   party who is pressing for discovery of something that

15   has not been agreed to at that point will have a

16   deadline to put in a letter or a motion, whatever it

17   is going to be.

18   MR. DOVE: It was going to be a letter to

19   whatever the party is which has the dispute.

20   JUDGE von KANN: Right. And then on

21   Monday, June 30, the other party would respond?

22   MR. DOVE: That is correct.

1   JUDGE von KANN: Okay. And then I guess,

2   as I say, if we gave you the morning of Tuesday, July

3   1st to get on the phone with one another and find out

4   whether you have reached agreement or not and if it is

5   still remaining, maybe each party should just fax to

6   us those two letters. Would that make sense?

7   MR. DOVE: It seems reasonable.

8   JUDGE von KANN: Okay. Well, that's one

9   less thing to worry about, then.

10   JUDGE GULIN: Letters?

11   JUDGE von KANN: Let's think about that.

12   Do these have to be filed if they are letters, as

13   opposed to motions, do we think?

14   JUDGE GULIN: I don't think the office

15   prefers us to receive anything directly from counsel.

16   MR. DOVE: You don't think the office will

17   allow that?

18   JUDGE GULIN: I don't think so.

19   JUDGE von KANN: Mr. Garrett?

20   MR. GARRETT: I think that if -- I don't

21   know whether one of these letters might ultimately

22   turn to be a significant issue for purposes of the

1   proceeding here, but it does make sense to have them

2   filed so that's their part of the record.

3   JUDGE von KANN: What if we had an

4   arrangement that by noon on July 1, you all would file

5   these letters with respect to any issue that had not

6   been resolved? And then we'll make some arrangements

7   for the Copyright Office to get us a quick copy, get

8   us a fax copy or something. Okay. Well, fine. That

9   takes care of that.

10   So let's think in terms of the 29th being

11   the settlements. And that will also be sort of our

12   deadline to let you know if we have thought of any

13   things that we would like included in the rebuttal

14   cases.

15   Now, in fairness, I don't think we will

16   have yet begun by that date the Program Suppliers'

17   case. So it's possible that that would trigger some

18   additional thoughts. But at least as to everything we

19   have been able to think of up to that point, we will

20   let you know because, even then, there is not a huge

21   amount of time. That is only about, what, I guess

22   three weeks or something until your rebuttal cases are

1   due.

2   I don't think it's likely that we would

3   come in and say it has suddenly occurred to us that we

4   would like you to go out and get 17 experts on the

5   following subjects, but there might be something that

6   we would ask you to try to clarify or do something

7   with.

8   Okay. Are there any other administrative

9   sort of things floating around that we need to be

10   aware of or need to deal with? No? All right. Well,

11   I guess we're adjourned until 9:30.

12   (Whereupon, at 4:38 p.m., the foregoing

13   matter was recessed, to reconvene at 9:30

14   a.m. on Friday, May 16, 2003.)

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CERTIFICATE

This is to certify that the foregoing transcript in

the matter of: Hearing: Distribution of the
1998 and 1999 Cable Royalty Funds

Before: Library of Congress
Copyright Arbitration Royalty Panel

Date: May 15, 2003

Place: Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

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